2 Property rights in legal history

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**Introduction**

Since time immemorial, the reach and the content of property rights change with society. These continual adjustments to the practical needs of society are concomitant to the purpose of these rights: serving society. The right of ownership is the most extensive and variable property right in the course of history. It has had many different meanings. These can only be understood by examining the particular society it served. The historical content of the right of ownership can be understood by studying codifications and statutes. These are important for the specific periods of history. The historical codifications often had major influences on later codifications and sometimes even on later civilizations.

In general, textbooks concerning the history of property law begin with Roman law, because of its major influence on modern private law of Western civilization. However, the ancient Egyptian and the ancient Greek cultures also had their influence on the Western legal systems. Greek civilization was greatly influenced by older civilizations, especially by Mesopotamian societies. The oldest code of law originates from this period of Mesopotamian dynasties and is known as the Code of Urukagina.

The two most famous and influential codifications of Roman law are the Lex Duodecim Tabularum (Law of the Twelve Tables) and the Corpus Iuris Civilis. Though the time difference between these codifications is over nine centuries, they resemble each other in several ways; contentwise as well as structurewise. The Lex Duodecim Tabularum became part of the cultural, historical consciousness of the Romans. This explains Gaius’ excessive interest in the Lex Duodecim Tabularum during the first century A.D., which resulted in an extensive comment (Spruit, 2003, p. 8).

The Roman right of ownership, *dominium*, has been cultivated over the course of time, from indefinite to extensive. Because of the gradual development of the right of ownership one single definition will not satisfy. However, absoluteness can be mentioned as *the* fundamental characteristic of the right of ownership (Zwalve, 2000, p. 100). Although Roman law exerted a strong influence on Germanic law, the Germanic right of ownership kept its own substance and can, in contrast to the Roman right of ownership, be characterized as social, meaning that the reach of
the Germanic right of ownership was bordered by the rights of others (Dooyeweerd, 1957).

During the Middle Ages, the Corpus Iuris Civilis was of great importance to the explanation of the different ownership relations between vassals and lords, which existed under the feudal system. These relations were explained by referring to the *actio directum* and the *actio utile* to be found in the Corpus Iuris Civilis. The clarification of these different ownership relations was founded on the concept of divided ownership (Feenstra, 1989, pp. 111–122). The use of the concept of divided ownership ended abruptly, at least on the mainland of Europe, by the entry of the French Revolution. The main reason to bring an end to the concept of divided ownership was the uncertainty and inequality brought along by this concept of ownership. Seen in the light of the feudal system, divided ownership often led to infringement of personal and individual freedom. From that moment the principle of a uniform concept of ownership became a fact (Zwalve, 2003, p. 156; Van den Bergh, 1979, p. 29).

The English right of ownership went through a wholly different development. After the Conquest of England by William the Conqueror in 1066 the feudal system was established. As a result of the feudal system the concept of divided ownership was introduced (G. Smith, 1990, p. 46). In contrast to the history of ownership on the mainland of Europe, the concept of divided ownership in England survives to this day.

1. **The Mesopotamian codes**

The oldest codes by far originated from the Middle East, to be more specific from Mesopotamia, an area geographically located between the rivers Tigris and the Euphrates. These codes give an insight into the societies which they served and derived from.

The oldest code known is the Code of Urukagina of Lagash which dates from around 2350 B.C. This code has never been retrieved but its existence is known from later codifications by other Mesopotamian kings. This code dealt with the reformation of abuses by previous rulers. The oldest code that came down to us is the Code of Ur-Nammu and dates from 2100 B.C., containing sanctions in case of serious personal injuries. Both codes are not familiar with the idea of ownership.

The idea of ownership was first codified in the Code of Eshnunna, around 1930 B.C. The idea of ownership was already rooted in this society. A free person was able to own a variety of objects and was capable to protect, if necessary with the help of society, his right of ownership. The Code of Eshnunna was a compilation of legal rules, such as rules on the administration of the kingdom, classes and persons, marriage and divorce, misdemeanours, contract and property (Yaron, 1988).
Following after the appearance of the Code of Eshnunna, the Code of Hammurabi was created around 1760 B.C. and strongly influenced by the Eshnunna’s Code. The Code of Hammurabi is the best-kept Mesopotamian code. The Eshnunnian idea of ownership was also incorporated in the Code of Hammurabi. This code was created with the idea to please the Gods and written to foster social justice, basically ‘an eye for an eye’. The script is written on a basalt stone containing 282 legal provisions of various areas of law, as matrimonial law, law of slaves, law of women and law of children. The code also includes provisions with regard to theft, damages and property (Diamond, 2004, pp. 82–103; Yoffee, 2005, pp. 102–109)

2. A brief insight into property law during the ancient Egyptian and Greek periods

2.1 Ancient Egyptian law

In ancient Egyptian societies religious beliefs encroached in every aspect of society. This resulted in an inextricable amalgamation between religion and politics. In the area of law this amalgamation brought about a remarkable interaction between the different ‘main characters of society’; the king and the goddess of law, Ma’at. The king was inferior to Ma’at and although the king was charged with creating legal rules, he could not be held responsible for them, only Ma’at. The major part of law concerned social customs and behaviour, and the rules of law were usually designed to protect families (David, 2000, p. 39).

Ancient Egyptian society was traditionally agricultural. Because of the limited fertile land, real property was extremely important. In the earliest history the king was an absolute monarch, with full powers over life, death, labour and property of all his subjects. He owned all real property. Nevertheless, private law existed in practice, and property could be the object of private legal transactions. The land was treated as if it was privately owned by individuals themselves. They could own land, use the land as they chose, such as burning the land for fertility purposes, and were able to transfer the land. Thus, ancient Egyptian law did recognize the concept of private property.

Besides this concept of private ownership, the law also recognized a number of derivative concepts relating to property, such as bailment and servitudes (VerSteeg, 2002, p. 123; Theodorides, 1971, p. 299). The presence of these concepts is proof of a strong property law system.

2.2 Ancient Greek law

The ancient Greek property law can, just as the ancient Egyptian law, be characterised as a strong property law system. Ancient Greek law was also
influenced by religion, although in a different manner as in ancient Egypt (Parker, 2005, pp. 61–81).

Agriculture played a leading role in Greek society, which led to a very well-developed right of ownership regarding land (Isager and Skydsgaard, 1992, p. 3). The law drew a clear distinction between movable and immovable property. There were no restrictions to the ownership of moveables in contrast with the ownership of immovable objects like land and houses. The latter was conserved for citizens. Citizens of foreign origin and foreigners were only able to own real estate when the right to acquire ownership was allocated to them. For real estate the obligation to record the transfer of ownership in a property register existed. Besides the privately owned estate, ancient Greek law knew also publicly owned estate and sacred real estate.

The owner of an object, movable or immovable, was able to use the object and sell it. Transferring partial enjoyment of the object was possible, as in the case of *mishosis* (lease). The owner was also entitled to offer the object as security. Ancient Greek law knew two types of security: personal and real security. Through personal security the person was pledging himself. By real security the object was offered as security. The oldest form of real security was *enechyon* (pawning). In the case of pawning the ownership passed to the creditor by selling the right to recovery to the creditor. The debtor retained possession of the object. When the debtor paid his debt to the creditor the property returned to him. If the debtor was unable to pay, the creditor retained ownership and had the right to possession (Maffi, 2005, pp. 259–263).

3. Developments of Roman society and law

3.1 The Roman political trilogy

Roman history traditionally discerns three main periods, each characterized by its own polity: the Monarchy, the Republic and the Principate. The beginning of the Monarchy is dated around 750 B.C. During this period the king was chosen for life by the people of Rome, the *comitia*. According to tradition, the rules of law were promulgated by the king in the quality of supreme priest. These rules are often indicated as *leges regiae*. However, these *leges regiae* cannot be considered as a result of considered legal politics.

With the fall of the Monarchy, in 510 B.C., the Republic was brought into being. The political power was taken by the Roman aristocracy, the Patricians, and divided between several officials, named *magistratus*. The assumption of the political power by the Patricians led to a conflict with the Plebeians, a prosperous part of the Roman population, who were not
assuming political powers. Not until 287 B.C. was this dispute settled by the Lex Hortensia, which put an end to the inequality of justice and legal insecurities (Spruit, 1994, p. 56; Spruit, 2003, p. 7).

In the atmosphere of the Republic the area of property law experienced an enormous growth. This growth is, to a certain extent, expressed in the Lex Duodecim Tabularum in 450 B.C. The Lex Duodecim Tabularum was the first codification in Roman law containing rules of private, public and procedural law. In spite of the incompleteness concerning the different rules and the lack of content, this codification has been of great importance. Even six centuries later an extensive comment on the Lex Duodecim Tabularum was written by Gaius (Hanenburg, 1972; Spruit, 2003, p. 15).

During the second part of the Republic polity, the Roman realm developed in a tearing rush. The territory of the Roman Republic was made of Western and Southern Europe, a part of Central Europe and Asia, Northern Africa and Egypt. This extension led to a social-economical and cultural development, which resulted in further civilization of private law.

At the start of the Principate in 27 B.C. the political powers were reunited in the hands of one man, Augustus, born as Octavianus, to restore the powers of state and the Republic establishments. The rules of Roman private law were spread out in an even bigger realm than during the Republic. Britannia and large pieces of the Middle East became part of the Roman realm. In this period the rules of private law became enlarged and refined. Many legal relations were controlled by the *bona fides* (good faith) whereby a concrete and just solution was placed in the hands of a judge, whom often was counselled by lawyers. Through this counselling the science of law flourished (Ankum, 1976, p. 3).

After a peaceful start the Principate became a very turbulent period. It brought on the division of the Roman empire into a West Roman and an East Roman empire, and in 476 A.D. the existence of the West Roman empire came to an end caused by an invasion of barbarian tribes.

The recapture of a part of the territory of the former West Roman empire by the East Roman emperor Justinian in 553 A.D. resulted in a renewed expansion of Roman law. Justinian was determined to systemize Roman law by creating a comprehensive Code. The Justinian Code, afterwards named the Corpus Iuris Civilis, became also valid in the recaptured areas. The West Roman territory was lost again in 568 A.D. and between the geographic borders of the formal West Roman empire the Corpus Iuris Civilis was lost sight of. The Corpus Iuris Civilis can be considered as the rounding off of the development of Roman law (Spruit, 2002, pp. 4–10).
3.2 Corpus Iuris Civilis
The Corpus Iuris Civilis was the first codification since the Lex Duodecim Tabularum which attempted to control all the different fields of law. The Corpus Iuris Civilis consisted of four parts; the Codex Constitutionum, the Digesta, the Institutiones and the Novellae Constitutiones.

The Codex Constitutionum contained a collection of imperial legislation of the Roman emperors. The Digesta, also named Pandectae, embraced a collection of legal writings containing private opinions from legal scholars such as Gaius, Ulpian and Papinian and was intended for practitioners and judges. The Institutiones were developed for a practical purpose, namely as a manual for students containing a general survey of the whole field of Roman law. The last part of the Corpus Iuris Civilis, the Novellae Constitutiones, was a compilation of later imperial legislation and added later (W. Smith, 1859, p. 302). The Corpus Iuris Civilis serves as one of the most revealing sources to gain an insight into Roman law.

3.3 Roman law

3.3.1 The actio as the foundation of the Roman legal system
In modern legal systems, the foundation for legal actions is found in subjective rights. Roman law on the other hand was unfamiliar with a legal system of rights: the legal system was based on actiones (actions or writs). It is mainly a difference in legal technique. The Roman way to start a civil proceeding was by appealing on an actio. An actio in Roman law can be defined as a person's rights to make his right object of a legal dispute. The actio includes the right to an actio and the actio itself. By working with actiones, Roman law made postulated procedural law. The term actio was also used to indicate a lawsuit.

Roman law made a distinction between actiones in rem, real legal claims, and actiones in personam, personal legal claims. The difference between the actiones is laid down in the answer to the question whether there is a contract between the parties. If there is a contract, it is a matter of an actio in personam, otherwise it is a matter of an actio in rem.

This distinction between actiones in rem and actiones in personam is quite similar to, and has been the basis for, the distinction between absolute and relative rights in modern, European mainland law. An absolute right gives a legal status to the owner of the absolute right, meaning that the absolute right can be defended against everybody. These absolute rights can be created only in certain circumstances, in contrast to relative rights. The latter being only bipartite, they can be created in any circumstances. A relative right cannot be invoked against any person, but only against a specific person. In contrast to relative rights, the choice of absolute rights
is limited in two ways: there is a limitation of the number of absolute rights and the content of the absolute rights is largely dictated by law. This limitation is named *numerus clausus* (closed number). The distinction between absolute and relative rights is the foundation for the distinction between property law and contract law (Derine, 1982, pp. 117–118; Kaser and Knütel, 2003, pp. 46–7; Mousourakis, 2003, p. 130).

The Corpus Iuris Civilis made a distinction between physical and non-physical objects. A physical object, indicated as *res corporalis*, is an object that can be touched, such as land, slaves, garments, gold, silver and innumerable other goods. Non-physical objects, *res incorporales*, on the other hand, cannot be touched, such as real and personal rights and usufructs. Only a legal, separate, independent and physical object can be the subject of an *actio in rem* (Kaser and Wubbe, 1971, p. 93).

Certain specific objects did not come under a *res*, namely *res divini iuris*, *res communes omnium* and *res publicae*. *Res divini iuris* were objects belonging to the Gods, as sanctuaries. *Res communes omnium* (common things) sufficiently satisfied the needs of people, but should not be a subject of power, like the air. *Res publicae* (public things) were objects owned by ‘the people’. These objects could be used by all people of a state, like public roads and harbours (Kaser and Knütel, 2003, pp. 119–120; Van der Steur, 2003, p. 111).

Another object-distinction made by the Corpus Iuris Civilis could be found in *res mancipi* and *res nec mancipi*. *Res mancipi* were those objects which the Romans most highly praised, as Italian soil, rural servitudes and slaves. A slave was not considered to be a person, but a thing. All other objects were *res nec mancipi*. This distinction was very important when it concerned a proper transfer of an object. A *res mancipi* was transferred through *mancipatio*, containing formal acts. The *mancipatio* had a restricted appropriateness; just Roman citizens could transfer and receive objects by *mancipatio*. Transferring a *res nec mancipi* occurred by merely transferring the possession of the object (Kaser and Knütel, 2003, pp. 119–120; Potjewijd, 1998, p. 12; Spruit, 2003, p. 179).

3.3.2 *The complicated content of dominium* The most important *actio in rem* according to Roman law is the *rei vindicatio*. The purpose of this legal claim was to protect ownership. During the Monarchy and the Republic, ownership was called *meum esse* (it is mine). The reach of the *meum esse* was not clear, which led to a vague boundary line between ownership and possession. As a result of the juridical development during the Republic, the extensive meaning of ownership was restructured in a more defined concept. Around the start of the first century A.D., ownership was named *dominium* and a distinction made between *dominium* and *possessio*
on the one hand, and *dominium* and limited real rights on the other hand (Kaser and Knütel, 2003, pp. 138–139; Mäkinen, 2001, pp. 11–15).

Although no definition of *dominium* was found in the Roman law, certain characteristics were given, such as the absoluteness of the *dominium*. Absoluteness contained the independence of ownership relating to other ‘rights’ and the absolute power of the owner to dispose of the object (Zwalve, 2000, p. 100). The absoluteness of *dominium* can be found in two *actiones*, offered to the owner when experiencing interference of his property. The first *actio* is the already mentioned *rei vindicatio*, which made it possible to claim movable goods or land from any possessor. The second *actio* is the *actio negatoria* that made it possible to sue any person who was interfering in the control of the property. Both *actiones* could be initiated against any possible possessor (Bouckaert, 1990, p. 782).

Until the fall of the West Roman empire several forms of ownership existed. First of all, Quiritarian ownership acquired under the *ius civile Quiritium* (civil law), the original Roman legal system. Besides quiritarian ownership there was praetorian ownership, which was extended by the *ius naturale* (natural law). Natural law consists of rules, which are common to all peoples, and are based upon objective and eternal norms. Praetorian ownership would only come into being when strict appliance of general rules would lead to an unreasonable outcome. In these cases praetorian ownership took precedence over civilian ownership. Even though the term ownership is used, the core praetorian ownership is not equal to quiritarian ownership. Actually, praetorian ownership should not be seen as ownership, but only as an absolute, exclusive right.

The praetor could allow praetorian ownership in two situations. First, when the possession of the object was provided by a person who was not appropriate to dispose of the object and second, when the acquisition of the possession of the object, a *res mancipi*, was not recognized by the *ius civile*. In the second situation the person did not become owner of the object, but merely possessor because the formal acts for transferring the object were not fulfilled. In that case the term ‘praetorian ownership’ was often replaced by the term ‘bonitarian ownership’.

Roman law knew, besides the praetorian ownership and the bonitarian ownership, two other kinds of ownership, namely ownership attributed to foreigners and ownership concerning immovables in the province. The above mentioned different forms of ownership were merged by the Corpus Iuris Civilis into one form of ownership, which excluded ownership where the possession of the property of the object was provided by a person who was not permitted to dispose of the object (Ankum, 1976, p. 39; Kaser and Knütel, 2003, pp. 139–140).
4. **Canon law, a powerful source besides Roman law**

In the course of the fourth century A.D. another source of law, based on Roman law, unfolded: Canon law. Despite the fact that Canon law did not have a substantial influence on the right of ownership, this new source should be discussed shortly in the interest of the development of private law.

The beginning of the development of Canon law was the promulgation of the toleration of religion by emperor Constantine the Great in 313 A.D., which brought about the restoration of Christian property that had been confiscated during a long period of persecution (Coleman, 1914, pp. 29–35; Van de Wiel, 1991, p. 29).

During the second part of the Middle Ages the scope of Canon law was large. Canon law emerged as a working international law and applied everywhere in Latin Christianity in contrast to the ordinary legal systems which were limited to a particular region. The rules of Canon law, *canones*, were applied equally to everyone, regardless of gender, class or social status. These *canones* were not published in official collections but only in various private collections such as the Decretum, written by Gratianus around 1140 A.D. By writing this comprehensive work Gratianus tried to eliminate the differences between the various private collections. The influence of the Decretum has been enormous. The Decretum was incorporated in the Corpus Iuris Canonici in 1582 and did not lose its validity until the twentieth century.

Since its reception, Canon law was fully separated from Roman law and became a separate source of law in its own right. The importance of Canon law grew, not only because of the expansion of the *canones* but also through the moral author compared with Roman law (Brundage, 1995, pp. 44–69; Lokin and Zwalve, 2001, pp. 124–137).

Until the development of Canon law, the main sources of law according to the Catholic Church were the *ius divinum* (divine law), positive law and *ius naturale* (natural law). Natural law prevailed through its dignity as divine source above all other sources. Even after the creation of Canon law, natural law remained of major importance. Natural law brought about the possibility to rectify positive law by appealing on the principle of equity. In the area of property law, Canon lawyers assigned great authority to the *bona fides* (good faith) (Lokin and Zwalve, 2001, pp. 23–29).

5. **Germanic law**

Around 400 A.D. the Germanic tribes invaded the West Roman empire. Finally this resulted in the abdication of the last West Roman emperor, Romulus Augustus, in 476 A.D. It resulted in the fall of the West Roman empire. Notwithstanding the conquests by the Germanic tribes, Roman law and Canon law remained in force. As Roman and Canon law were
much more developed than the Germanic laws and each Germanic tribe had its own laws, it was undesirable to impose the rather primitive Germanic laws upon the original inhabitants of the West Roman empire. As a consequence, the people remained under the Roman legal system and the Germanic people under Germanic laws. The co-existence of different systems of law for different people residing within the same territory is often referred to as the principle of personality of law (Gilissen and Gorlè, 1991, pp. 155–172).

Primitive Germanic law consisted of unwritten immemorial customs. With the emergence of new Germanic kingdoms on the seized land of the West Roman empire these customs were, more and more, written down and referred to as *leges nationum Germanicarum*. The Codex Euricianus is the oldest Germanic codification and dates around 480 A.D. Germanic law developed under the influence of Roman and Canon law and, vice versa, Germanic law influenced Roman law. As a result, Roman law degenerated and the original Roman law gradually disappeared.

Consequently, the principle of personality of law was replaced by the principle of territoriality, under which the law of an area was applicable to all who lived in this certain area (Van Caenegem, 1992, pp. 18–20).

Although Germanic law and Roman law grew together, a fundamental difference between their concepts of ownership remained. The Roman concept of ownership was characterized by absoluteness, containing the independence of ownership as against other ‘rights’ and the absolute power of the owner to dispose of the object, as discussed in paragraph 3.3.2 (Zwalve, 2000, p. 100). The Germanic right of ownership, on the other hand, contained a strong social element, meaning that by exercising the right of ownership the owner had to consider the interests of third parties within the community.

This social element comes from the collective right of ownership that underlies the Germanic society. An example of this social element is to be found when studying the power to destroy an object. When destroying an object there was always another person that was hindered in his rights. Destruction was against the Germanic notion of ownership (Wesel, 1997, p. 182). This does not mean that individual ownership did not exist at all under Germanic law. Individual ownership has been developed in the course of time, next to the already existing collective ownership, but it was limited to clothing, weapons and other objects necessary for daily life (Kunst, 1968, pp. 190–198; Wesel, 1997, p. 182).

6. **England’s remarkable (law) transformation**

While the European continent was stocked in the ‘Dark Ages’, William the Conqueror invaded England in 1066 A.D. The existing English
constitutional and legal history and major diversity of law ended abruptly. The Norman conquest was the starting point for the development of current English law. The introduction of the full-grown feudal system led to a whole new classification of English society. William had an uncompromising view about the land of his conquered kingdom; all the land belonged to him and in this view he placed himself on top of the feudal pyramid. William seized the land and distributed it among his followers but he also allowed the Englishmen to redeem their estates by paying for them (G. Smith, 1990, pp. 39–57).

6.1 England’s remarkable law transformation

During the twelfth and thirteenth centuries common law originally developed as the collective judicial decisions that were based in tradition, custom and precedent. Under the reign of King Henry II (1154–1189) common law was further developed. This king introduced the first national courts, known as the Royal Courts. At the beginning the competence of the Royal Courts was very restricted, but in a short time the competence extended enormously which finally resulted in one common English law.

A civilian was only competent to go to court when he had a writ. A writ was a letter containing a command of the king, set up by his chancellory. The writ was only granted when the court was competent. But this system had a flaw: it seemed that the Royal Court had no competence if there was no writ available. The solution was found in expanding the competence of the Lord Chancellor, head of the Chancery and by this decision the Court of Chancery was born. At the start of this ‘new way of jurisdiction’ the person of the Chancellor was a high-placed cleric, who based his decisions on ‘equity’, in meaning of reasonableness and fairness. By equity the shortcomings of common law could be overcome.

Since the sixteenth century, equity became, besides common law and the statutes, the third legal source in England. During the seventeenth century, the judgments of the Chancellor were collected. In the eighteenth century it became clear that equity was not equal to reasonableness and fairness; equity exists of several solid and accurately formulated legal rules and was conceived as a corrective system of justice.

By the Judicature Acts of 1876 the two courts, the common law courts and the equity courts, lost their independence, and they were joined together in the Supreme Court of Judicature (Zwalve, 2000, pp. 29–33; Lokin and Zwalve, 2001, pp. 358–380; Gray and Gray, 2007, pp. 20–22). This reformation, however, did not lead to any alteration in material law.

The most remarkable equitable development is the trust. The core of the trust is splitting of the ownership of an object and assigning it to different persons, so that the legal ownership of an object goes to the trustee, and
the equitable ownership of the same object to another person, the beneficiary. The beneficiary can enjoy all the benefits of the object (R. Smith, 2006, pp. 18–20). The trust was, even before the Conquest of 1066, developed in practice, but was not recognized by the courts. An example: person (A) was leaving his land for a specific period and he transferred the land to a friend (B), with the intention that B would take care of the land during this period. After returning to the land, A expected B to transfer the land back to him. Mostly B was willing to do so, but sometimes B refused. At common law A did not have any rights against B since he had transferred the estate to B, so B became the owner of the estate.

In the fourteenth and fifteenth century the trust went through a remarkable development. The Chancellor decided that parties could be forced, when demanded by one of the primary parties, to act according to the agreement. Recourse to this agreement was also possible when a third party was entitled as new legal owner of the property. In favour of the original owner A the Chancellor accepted another type of ownership: ownership in equity. So, in equity A was recognised as the owner. This development resulted in two possible types of ownership; one at common law and one in equity (Edwards and Stockwell, 2005, pp. 6–8).

6.2 The characteristics of English law

English law deviates strongly from the judicial systems on the European mainland. The main distinguishing characteristics of English property law will be discussed below.

The first distinguishing characteristic of English property law can be found in the distinction between *actiones in rem* and *actiones in personam*, discussed earlier in 3.3.1. On the European mainland this division leads to a division in absolute and relative rights in the judicial systems. In English law this division leads to a different structure, which can be explained on the basis of the writs.

During the thirteenth century it was Bracton who made a distinction between writs *in rem* and writs *in personam*, which resulted in the distinction between immovable and movable objects. In case of a writ *in rem*, the object to which a person was entitled could only concern an immovable object. A writ *in rem* is seen as a real action and this part of property law is indicated as the law of real property. When it concerned a writ *in personam*, there was a movable object involved, and a demand for compensation was the only option. The writ *in personam* is indicated as personal property. In contrast to the European mainland the distinction of the actions *in rem* and *in personam* did not lead to the division of property law on the one hand and the law of obligations on the other hand but led to a distinction in property law itself (Zwalve, 2000, pp. 97–100).
The above mentioned distinction between movables and immovables leads to the second characteristic of English property law. This characteristic is the structural difference between property law relating to land and property law relating to other property.

Personal property at common law knows an absolute ownership, whereby the ownership cannot be divided. In equity, ownership can be divided under a trust of personal rights. All objects of personal property can be defined as chattels, in contrast to the objects of land property which are indicted with the term estate. These chattels can, with the exception of leasehold, be divided into tangible and intangible movables (Goode, 2004, pp. 27–55). Tangible property has a physical substance and can be touched. Real estate and money though cannot be indicated as a tangible. Intangible property exists in a claim to land, to goods or to money.

Personal property is not entrusted with the inheritance of the feudal system, in contrast to the rules of English real property law. These latter rights grew in an era where the king was lord of all the land and land stood for wealth (Gleeson, 1997, pp. 3–14). Property land law will discussed hereafter.

The third characteristic of English property law, that is also a deviation from all the modern concepts of ownership in continental Europe, is the approach of the concept of ownership concerning the property of land. Ownership was in Roman law, just as in modern law systems as discussed above, absolute. English law on the other hand is not familiar with an absolute right of ownership, which is characterized by its independence from other rights and is not related to time. This appears not only from the already discussed split ownership, where ownership is always divided in ownership and possession, but also from the still maintained feudal land structure from which various estates are generated.

Concerning real property land law, the formal structure is nowadays still feudal, so the king is formally still the only lord of all the land. The holder of the estate can have an estate in fee simple absolute in possession, an estate in fee tail or an estate for life. The estate in fee simple absolute in possession is often indicated with fee simple and is, as discussed below, correspondingly close to the continental ownership (Burn, Cartwright and Cheshire, 2006, pp. 27–28; Zwalve, 2000, p. 100).

The estate in fee simple is the most extensive right one can have in land. Fee simple indicates that this estate does not know any limitation in time, so that it will not end with the death of the holder of the estate as, for example, the estate for life, as will be discussed later on. The Law of Property Act 1925 points out that this estate is one of the two primary estates in modern land law, but that it can be a legal estate only when it satisfies the demand of “absolute and in possession”. ‘Absolute’ implies
that the rights concerning the estate are exclusive, meaning that there are no restrictions whatsoever. ‘In possession’ signifies that the holder of the estate has the enjoyment of the property right. No one can have a stronger title to the land than the holder of the estate who has the estate in fee simple.

The estate in fee tail and the estate for life are equitable rights and are not comparable to the absolute ownership of the European mainland. The estate in fee tail can be defined as an estate in land that is limited in inheritance, whereby only direct heirs could be eligible for this estate. Besides the limitation of the class of heirs, there was also a limitation concerning the tenant’s competence to act; the class of heirs had a certain expectation and with regard to this expectation the acts of the tenant were limited. The estate in fee tail is as legal estate not allowed anymore since the Law of Property Act 1925, but only possible as equitable estate.

The estate for life can be compared with usufruct. This estate is linked to the life of the holder of the estate and the estate comes to an end at the moment of his death. From the moment of death of the original holder of the estate the estate returns to the person, the grantor, who established the estate. Even when the original holder of the estate has conveyed the estate, the estate still lasts only for the time of the life of the original holder of the estate. This regression of the estate is often indicated with the term ‘reversion’. The estate for life has the logical result that it cannot be inherited (Zwalve, 2000, pp. 113–155; Burn, Cartwright and Cheshire, 2006, pp. 167–182; Gray and Gray, 2007, pp. 16–18).

Besides the above-mentioned division of estates there is another commonly used distinction; the freehold and the non-freehold estates. The above-mentioned estates are all freehold estates, implying that the king has granted an interest over the land. This freehold estate represents real property. At common law the primary estate in land is the freehold, meaning the above-mentioned estate in fee simple absolute in possession. The non-freehold estates give their holder the ‘using rights’ of the estate for a certain period of time, also indicated with the term lease. These estates are personal property (Zwalve, 2000, pp. 125–129). The above-mentioned characteristics of English property law do not cover all its characteristics but cover the most important interests for this chapter.

7. The resurrection of Roman law
As seen above, England received a uniform law much earlier than the mainland of Europe. The development of this uniform law did not experience any (immediate) influence of the Corpus Iuris Civilis. On the mainland of Europe, the development of law went completely different.

From the twelfth century onwards mainland lawyers became interested
in the Corpus Iuris Civilis, which led to developments in all the areas of law, especially in the area of private law. This period is characterized as ‘the reception of Roman law’ and can be considered as a point of departure of the European legal science since the Middle Ages. The reason for this growing interest in the Corpus Iuris Civilis can be found in the weakness of local laws and the lack of unity of the Germanic laws (Huebner, 2000, pp. 1–16). The Corpus Iuris Civilis was not treated as a codex but as an object of intellectual reflection. In this way the Corpus Iuris Civilis made a big contribution to the development of private law. The validity of the Corpus Iuris Civilis existed until the start of the nineteenth century, when the different European mainland countries introduced their own codes. Nevertheless, the Corpus Iuris Civilis remained a source of inspiration (Spruit, 2003, pp. 90–97).

The first lawyers who studied and taught the Corpus Iuris Civilis, also known as Glossators, were living in Bologna, Italy between 1100 and 1250 A.D. They treated each individual text separately, and put their comments down in glosses and summaries. The Glossators used the Corpus Iuris Civilis as a practical application, but they often forgot to take into consideration the differences between Roman society and the society of the Middle Ages. This often led to adaptation of Roman law to the needs of the medieval society.

As an example of adaptation the expression *ius in re* can be mentioned. The Glossators related a *ius in re* (a property right in modern terms) to all cases where the Corpus Iuris Civilis speaks of an *actio in rem*. But in the Corpus Iuris Civilis itself the expression *ius in re* was unknown, because Roman law did not even know rights; it only knew actions.

A very confusing and important adaptation can be found in splitting the *dominium*. The Glossators were searching for a solution to explain the situation and the rights in a feudal relation between vassals and their lords. Feudal law was developed from the eighth century on as an original system of law. It was created independently of Roman or Germanic law and was mainly developed on customs (Van Caenegem, 1992, p. 20).

The Glossators found two *actiones* in the Corpus Iuris Civilis that could function as an interpretation of this feudal relationship, namely the *actio directum* and the *actio utile*. The *actio directum* was treated as the right of main *dominium*, and the *actio utile* as the right to use the *dominium, usus fructus* (Coing, 1953, p. 351; Feenstra, 1979, pp. 6–20; Visser, 1985, pp. 39–40). As seen above, Roman law knew different kinds of ownership, but did not split the core of the ownership as has been done by the Glossators. Splitting ownership in the core is only possible by approaching ownership as a bundle of rights.

Bartolus de Saxoferrato (1313–1357) struggled with fitting the feudal
system into the terms of *dominium*. Bartolus defined ownership as a right to have access to an object in *perfecte disponendi*, which can be translated as full disposal. By defining ownership as *perfecte disponendi* Bartolus had the intention to make a distinction between the rights of *dominium* on the one hand and the right of possession on the other hand. In contrast to the Glossators, Bartolus distinguished three forms of ownership; *dominium directum*, *dominium utile* and *quasi dominium* (Coing, 1953, pp. 364–371).

The meaning of the *dominium directum* and the *dominium utile* can be compared with the *dominium directum* and the *dominium utile* as defined by the period of the Glossators. The third kind of dominium, the *quasi dominium*, was less accepted than the *dominium directum* and the *dominium utile*. This *quasi dominium* was used to protect a person who did not have the *usucapio* (ownership acquired by possession during a certain period of time) yet and was protected by the *actio Publiciana*. The *actio Publiciana* was brought into being for the protection of the praetorian owner (Feenstra, 1989, pp. 111–113).

One of the followers and student of Bartolus was Baldus de Ubaldis (1327–1400). His considerations have been very important with regard to the further development of the law of property. Baldus used the term *iura realia* instead of *iura in re*, which he defined as rights without the existence of any commitment. Baldus was the first lawyer who came up with an enumeration of the *iura realia*. This enumeration existed of *dominium*, the right of succession, personal servitudes, (real) servitudes and hypothec, including the *pignus*. A further distinction between these rights was not made by Baldus.

It was Hugo Donellus in the sixteenth century who made a distinction between *dominium* on the one hand and limited real rights on the other hand. This distinction became the basis for Grotius’s theory of *dominium*, which became a leading principle in the legal systems on the European mainland. Grotius’s theory will be discussed hereunder (Feenstra, 1979, p. 20; Smits, 1996, pp. 52–53).

8. The influence of natural law on property law and the run-up to the Age of Reason

During the sixteenth and seventeenth century the insights changed. The Corpus Iuris Civilis was not the main source of law anymore. Its leading position was taken over by natural law, which content was set by nature and therefore it was valid everywhere. The change was brought about by the growing opinion that the rules of the Corpus Iuris Civilis were not timeless. Many solutions from the Corpus Iuris Civilis were sensed as irrational and therefore replaced by rational solutions found in natural law (Lokin and Zwalve, 2001, pp. 30–33).

The spiritual father of natural law in modern times was Hugo Grotius,
who lived from 1583 to 1645. Two of his most important works were ‘Inleydinge tot de Hollantsche regts-geleertheyt’ (Introduction to Dutch jurisprudence) and ‘De jure belli ac pacis’ (On the Law of War and Peace). In these works he lays down his concept of natural law. According to Grotius the meaning of natural law is to be found in the reason (Scruton and Daalder, 2000, p. 37; Heirbaut, 2000, p. 85).

Grotius proposed some remarkable changes to private law. These proposals deviated from the rules of the Corpus Iuris Civilis. The theory of Grotius concerning ownership and limited property rights is an excellent example of his ideas on private law. Grotius’s ideas on ownership did not deviate much from the concept of ownership known in the Middle Ages. Grotius made a distinction between *dominium* or full ownership on the one hand and incomplete ownership on the other hand. With full ownership he meant the position of the juridical owner, during the Middle Ages indicated with the term *dominium directum*. Incomplete ownership corresponded with the medieval term *dominium utile* and was according to Grotius a descent from the full ownership and therefore also enforceable against everyone. Grotius sees incomplete ownership as the same concept as Donellus, namely as *ius in re aliena*. Grotius’s theoretical development was responsible for the disappearance of divided ownership (Van der Walt, 1995, pp. 20–22; Feenstra, 1989, pp. 118–122).

Another example of Grotius’s different point of view was his theory on the moment of transferring property. In Roman law the ownership of an object transferred at the moment that the possession of the object was given to the buyer. The opinion of Grotius was that according to natural law the ownership was already transferred at the moment that the parties agreed on the transfer of ownership; at the moment of closing the contract (Lokin and Zwalve, 2001, p. 33).

In the extent of the ideas of Grotius, natural law flourished during the eighteenth century in all the European academies. Grotius’s ideas on natural law continued to be revered and expanded by philosophers like John Locke (1632–1704) and Jean-Jacques Rousseau (1712–1778). Discussion of these philosophers would, however, go beyond the scope of this chapter.

The flourishing period is called ‘the Age of Reason’ and was a period of rationalism. In the thought of rationalism the law needed, for the sake of legal security, to be reformed because of its very divided and chaotic law structure; the law consisted of custom law, royal legislation, Canon law and Roman law.

9. How the history of property law became French toast. . . .

The starting point for the French Revolution was the threat of bankruptcy of the French state in 1788, and the way in which King Louis XVI
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tried to turn this disaster aside by calling the Etats Généraux together. The Etats Généraux met on 5 May 1789, for the first time since 1614, holding several meetings with the intention of presenting reforms to prevent bankruptcy. In the past the Etats Généraux, represented by the three classes; the nobility, the clerical order and the bourgeoisie, were only called together for special occasions, especially when an additional flow of money was needed.

During one of the meetings, the bourgeoisie was not satisfied with the procedures concerning the counting of the votes. They separated themselves from the nobility and the clerical order and adopted the name: ‘Assemblée Nationale Constituante’ or National Assembly. The Assembly strived for a constitution, an idea that was a remaining product of natural law. This constitution should make an end to the different rules of law existing for the different classes and should bring the number of legal systems existing back to one; the constitution should bring equality before the law (Lesaffer, 2004, pp. 367–368).

Equality was not found in feudal relations during the eighteenth century. The society of the eighteenth century was, just as during the Middle Ages, controlled by the feudal system. But the feudal obligations accompanied by the feudal relations could not be compared with the obligations during the Middle Ages. The lord, holder of the *dominium directum*, lost his right more and more to the tenant, holder of the *dominium utile*. The obligations from the tenant to the lord, which were set in return for the *dominium utile*, did not increase, but they actually decreased. Financial obligations became worthless because of inflation; personal obligations on the other hand became near to useless because of a changing society. Besides the decreased value of the obligations, the content of the tenants’ obligations was often unclear, which resulted in confusion. As a result of the shift of the amount of rights between the lord and the tenant and the unclerarness of the content of the obligations, the value of the right of the lord became worthless. By the abolition of the feudal system, the *duplex dominium* (double ownership) was rejected and from that moment on the only kind of ownership accepted was the *dominium utile* (Heirbaut, 2003, pp. 301–320).

The first major step to equality was made by the National Assembly decree of 4 August 1789. With the decree feudalism and the attached privileges of the nobility were abolished. The abolition of feudalism was recommended by the nobility. The consequence was that all Frenchmen became citizens, and recognized as ‘libres et égaux’ (Lokin and Zwalve, 2001, pp. 182–210). Equality came to expression in the ‘Déclaration des Droits de l’Homme et du Citoyen’, that was accepted by the National Assembly on 26 August 1789. The Declaration consisted of a preamble and 17 articles,
containing a set of individual and collective rights intended to give an enumeration of the most important rights.

Article 2 gave an enumeration of human rights and also mentioned freedom of ownership. The juridical explanation of freedom of ownership was discussed in article 17: ‘La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n’est lorsque la nécessité publique, légalement constatée, l’exige évidemment, et sous la condition d’une juste et préalable indemnité’.

Boersema discusses in his book ‘Mens mensura iuris’ the content and the relation between these two articles. Although the relationship and the content of these articles are beyond the reach of this chapter, it needs to be pointed out that article 17 deals with the terms ‘inviolable’ and ‘sacral’. These terms mean that the ownership concerning an object is given by God, and that the ownership is inviolable. Ownership can only be meant to be inviolable when it is taken out of a social environment, otherwise the inviolability cannot be guaranteed. So article 17 does not refer to a positive right of ownership, but only to ownership placed outside the social environment (Boersema, 1998, pp. 45–81).

The Déclaration des Droits de l’Homme et du Citoyen has been of major importance since it came into effect. With the introduction of the first written Constitution, in the autumn of 1791, the Declaration was incorporated in the Constitution as a preamble. From that moment on France became a parliamentary and constitutional monarchy (Lesaffèr, 2004, pp. 370–373). But the days of the monarchy were numbered and it was finally abolished on 21 September 1792. The abolition of the monarchy marked at the same time a new polity, the republic. As a result of this new polity, society demanded a new constitution. The ratification of the Constitution took place in June 1793. It was suspended because of the ongoing war, which finally resulted in the fact that it never came into force (Lokin and Zwalve, 2001, pp. 186–188).

After the Constitution of 1793 several drafts followed, but none of them has had such a major influence on the codification history of the European mainland as the ‘Code civil des Français’, in short: the Code civil. The Code civil, during the Napoleonic era also named the Code Napoleon, entered into force on 21 March 1804. This codification contained a definition of a property right in article 544 C.C.: ‘La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu’on n’en fasse pas un usage prohibé par les lois ou par les règlements’. This article gives a very far-reaching review of individual freedom concerning the use of the right of ownership. Only through a conflicting situation by law or regulation will the freedom to use the right be put aside. With the clause ‘la manière la plus absolue’ is meant that an object can only be
owned by one owner. The property right of the owner can only be divided when the Code civil approves (Danet, 2002, pp. 215–225). By this phrase the feudal system was definitively abolished.

In the countries which Napoleon conquered the legal power of the Code civil was introduced. After the defeat of Napoleon many of these countries decided to apply the Code civil until they had completed their own codex. Each country came up with its own code, containing its own rules of law and based on its own principles; the solutions for the many different legal questions were very diverse. However, the different codes all hold on to the uniform concept of ownership, fearing the return of the unfair consequences of the feudal system.

10. . . Or not?
The previous pages show that the main characteristics of the concept of ownership, as it exists on the European mainland, are uniformity and absoluteness. The following pages display the limitations to these characteristics.

10.1 Infringements on the absoluteness of ownership
In principle third parties are not allowed to infringe on the right of ownership, because it would alienate the characteristic of absoluteness. Nevertheless, there are certain infringements an owner has to tolerate. These are the infringements that find their justification in the balancing of the interests of the owner on the one side and interests of a third party on the other side. The balancing may result in a lawful infringement of the right of ownership under rules of private or public law (Van Dam, Mijnssen and van Velten, 2002, pp. 35–54).

Public law infringements on the right of ownership follow from laws, decrees and rules of unwritten public law. These rules of public law may limit the owner’s right to use the property as well as the right to dispose of it. Furthermore, authorities may have specific rights concerning the objects of ownership. The most far-reaching infringement by public law is expropriation. In the case of expropriation the right of ownership is taken away from the owner for the sake of the public interest (Van Dam, Mijnssen and van Velten, 2002, pp. 26–34).

Private law infringements derive from the rights of third parties and rules of unwritten private law. Under certain circumstances the exercise of property rights may amount to abuse of competence and be unlawful for that reason. In a case of abuse of competence the owner exceeds the competence linked to his property right. Moreover, causing nuisance give the neighbours a tort action against the person causing this nuisance. Nuisance is an act which interferes with the enjoyment of the neighbouring
property. Not every act of nuisance can be considered to be unlawful: this depends on the nature, extent and duration of the impediment and also on the damage caused by it. If the nuisance is regarded as unlawful the law will normally give the neighbours a tort action against the troublemaker (Van Dam, 2006, pp. 389–396; Pitlo, Gerver and Hidma, 1995, pp. 199–205).

Article 1, First Protocol of the European Convention on Human Rights (ECHR), expresses the protection of the right of ownership against infringements of third parties. Article 1, subsection 1 provides that ‘every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law’. By recognizing the right of peaceful enjoyment, article 1 guarantees the right of property, according to the European Court of Human Rights (Marckx v. Belgium, application no. 6833/74). The right of property has to be understood in a broad sense. The Court stresses that: ‘possession has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions”’, (Gasus Dosier- und Fördertechnik GmbH v. The Netherlands, application no. 15375/89). Rights and interests that do not have a financial or economic value are not covered by article 1 (Barkhuysen, van Emmerik and Ploeger, 2005, pp. 109–112).

The second sentence of article 1, subsection 1, provides that no one can be deprived of his or her property, except when the deprivation is in the public interest and can be justified by an action permitted by law. This sentence gives the states a certain margin of appreciation when judging if the law governs the aim of any interference, as well as its proportionality and the preservation of a fair balance (J.A. Pye (Oxford) Ltd v. The United Kingdom, application no. 44302/02). The legal measure taken has to be reasonable and proportional having regard to the goal aimed for: there has to be a ‘fair balance’ between the public interest on the one side and the protection of individual property rights on the other side (Van der Pot, Elzinga and de Lange, 2006, pp. 440–443). The protection offered by article 1 against expropriation by a state is a minimum standard. The states are free to offer additional protection.

10.2 Infringements on the uniformity of ownership
Many codes that had been developed in the countries on the European mainland following the French Revolution contained the principle of uniform ownership. However, the legal development in several countries during the last two centuries casts doubt on the validity of uniformity as a characteristic feature of ownership. More and more uniform ownership
was regarded as rigid and inflexible. This development results from the demand of society that struggles with the uniform concept. As a consequence of this development the distinction between relative or personal rights on the one hand and absolute rights on the other hand has become vague, which in several cases led to divided ownership. There are many examples to name. Almost every country has its own exception to the principle of uniform ownership, but a complete enumeration goes beyond the reach of this chapter.

The German foundation of a uniform concept of ownership is laid down in §903 Bürgerliches Gesetzbuch (German civil code): ‘The owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence’. But also the German legislator created deviations on the uniform concept of ownership. A remarkable example of divided ownership in German law is the Treuhand (trust).

With Treuhand the Treugeber (settlor) transfers the Treuhand-ownership to the Treuhänder (trustee). The Treuhand-ownership can be seen as the juridical ownership with regard to an object. Although the Treugeber has transferred his juridical ownership to the Treuhänder, he retains the economic ownership (Schulte-Bunert, 2005, pp. 14–27; Wieling, 2006, pp. 799–818). The concept of Treuhand shows major similarities to the common law express trust.

A recent development in the field of divided ownership is the French fiducie. The fiducie was introduced into the French civil code by statute of 19 February 2007. The fiducie is defined in article 2011 of the civil code: ‘La fiducie est l’opération par laquelle un ou plusieurs constituants trans- fèrent des biens, des droits ou des sûretés, ou un ensemble de biens, de droits ou de sûretés, présents ou futurs, à un ou plusieurs fiduciaires qui, les tenant séparés de leur patrimoine propre, agissent dans un but détermi- miné au profit d’un ou plusieurs bénéficiaires’.

In the case of fiducie the property is transferred by the settlor to the fiduciary, under an obligation to hold it for the benefit of another, the beneficiary. This type of fiducie is often defined with the term fiducie-gestion. Besides the fiducie-gestion, French law distinguishes another two types of fiducie, the fiducie-sûreté (security trust) and the fiducie-transmission (transmission trust).

The fiducie-gestion gives the opportunity to create arrangements equivalent to the common law trust already discussed above. The fiducie-gestion is often indicated as the French trust (Bell, Boyron and Whittaker, 2007, pp. 340–341).

As we have seen above, both developments, the German Treuhand as well as the French fiducie, lead to divided ownership.
Conclusion
Ownership is the most comprehensive right a person can have regarding an object. There has always been a strong interaction between law on the one side and the needs of society on the other side. Therefore, ownership cannot be precisely defined because its meaning and reach adapt to the social needs. This interaction is reflected clearly in Roman and Germanic ownership.

Although Roman ownership has been refined during the three main historical periods, each characterized by its own polity: the Monarchy, the Republic and the Principate, the characteristic of absoluteness should be mentioned as the fundamental characteristic of the right of ownership. Absoluteness can be defined as the independence of ownership relating to other rights and the absolute power of the owner to exercise authority over the object.

On the contrary, Germanic ownership cannot be characterized as absolute, but is, more than Roman law ownership, restricted by interests of the community; the Germanic owner has to take account of the interests of third parties within the community. This social content derives from the notion of collective ownership that was the basis for the Germanic individual ownership.

The interaction between the social needs on the one hand and ownership on the other hand underlies the different forms of ownership in a particular society. The reasons for acknowledgement of the plurality of ownership differed per society. Roman society was familiar with different types of ownership, such as ownership attributed to foreigners and ownership concerning immovables in the province. But the two most important types of ownership were the quiritarian ownership and the praetorian ownership. Quiritarian ownership can be defined as civil ownership. Praetorian ownership comes into being only when strict application of general rules would lead to an unreasonable outcome. In the praetorian ownership the social need is laid down to amend the hardship caused occasionally by the quiritarian ownership.

The medieval feudal system also knew different types of ownership which were called *dominium directum* and *dominium utile*. In contrast to the Roman *dominium* these were not different types of ownership which existed next to each other, but types of ownership that emerged after the division of the original ownership. The *dominium directum* was treated as the actual, but bare right of ownership, of which the *dominium utile*, the right of exclusive use of the object, was separated.

These different types of ownership, often referred to as *duplex dominium*, were not created out of the need to correct hardship, as was the case in Roman law, but out of the need to give expression to the relations between vassals and lords in the feudal system.

English ownership concerning land is, like medieval ownership, based
on the feudal system and can be defined as divided. As in the Middle Ages on the European continent divided ownership can be explained as splitting of the right of ownership in a right of use and in a right of bare ownership.

With the French Revolution the natural interaction between society and ownership ended abruptly. One of the core notions of the French Revolution was equality, but equality was not found in the feudal system. The commitments derived from the feudal system were in general formulated in the interest and advantage of the aristocracy. The legal basis for these commitments was given by the possibility to split the ownership. By bringing down the feudal system, divided ownership was abolished; the only kind of ownership accepted was the *dominium utile*. From that moment on ownership was defined as absolute and unitary.

The unitary and absolute concept of ownership has, even after the Napoleonic era, been continued by the different countries on the mainland of Europe, mainly out of fear of inequality. The English divided ownership, on the other hand, was not replaced by the unitary concept of ownership, because England was not involved in the French Revolution.

The consequence of strict adherence to the unitary and absolute ownership is that ownership can no longer adapt freely to the needs of society. However, in the centuries following the introduction of the absolute and uniform ownership the possibilities to restrict the absoluteness of ownership have grown. Infringements on the absolute ownership characteristic are possible when they result out of written or unwritten law, or when resulting from the rights of others. In this way the social needs are reflected in the reach of ownership.

Concerning the unitary ownership characteristic, society has created different kinds of ownership, which can be seen as forms of divided ownership, as the *Treuhand* (German trust) and the *fiducie-gestion* (French trust). Both forms of divided ownership are codified.

With the possibility to limit absolute ownership and with the increase of the number of different kinds of ownership, the unitary and absolute concept of ownership has in fact come to an end.

**Bibliography**


Property rights in legal history


Coleman, Christopher (1914), Constantine the Great and Christianity, three phases: the historical, the legendary and the spurious, New York: The Columbia University Press.


Van Dam, C., F. Mijnsen and A. van Velten (2002), Mr. C. Aser’s Handleiding tot de beoefening van het Nederlandse Burgerlijk Recht, Goederenrecht, Tweede Deel: zakelijke rechten, Deventer: Kluwer.


Edwards, Richard and Nigel Stockwell (2005), Trusts and Equity, Harlow: Pearson Education.


Hansen, Jacoba (1972), De wet der twaalf tafelen, Gent: Story-Scienzia.


Mousourakis, George (2003), The Historical and Institutional Context of Roman Law, Aldershot and Dartmouth: Ashgate Publishing.


Scruton, Roger and Hessel Daalder (2000), Spinoza, Rotterdam: Lemniscaat Publisher.


Cases
Marckx v. Belgium, 13 June 1979, application no. 6833/74.
J.A. Pye (Oxford) Ltd v. The United Kingdom, 8 June 2004, application no. 44302/02.