Chapter 6
The Importance of the Social Function of Property—Norway

Geir Stenseth

Abstract Léon Duguit's vision of a new legal approach entailed dismantling the metaphysical and individualistic legal system, and replacing it with a realistic and social system of law. Probably no society has carried out such a vision as has Norway, which to a large extent has abandoned comprehensive legal concepts and opened itself up for real world considerations as a valuable source of law. Despite of this there are scant references to Léon Duguit in Norwegian legal scholarship, with one significant exception: Law Professor Ragnar Knoph (1894–1938), who is regarded as one of the most influential Norwegian legal scholars. His knowledge of French law and jurisprudence—including the works of Léon Duguit—put a distinctive mark on his writings. This chapter explores how Léon Duguit did influence the legal thinking of Ragnar Knoph, and how the interaction between political institutions, legal institutions and legal scholarship has promoted social progress through law and developed the social function of property in Norway.

Keywords Nordic Realism · Scandinavian Legal Realism · Legal culture · Legal pragmatism · Real world considerations · Subjective rights · The substance of property rights · Legal consequences of inactivity · Legal standards · Real property · Functional property concept · Expropriation · Regulatory takings compensation · Non-compensatory regulations · The social function test · The European Court of Human Rights (ECtHR)

6.1 Introduction

Probably no society has carried out Léon Duguit's vision of law as a social function as has Norway. In particular, since World War II, there has been a remarkable interaction between political and legal institutions (including academia) to promote social progress through law. The law—and its institutions—have been used as tools to

G. Stenseth (✉)
Faculty of Law, Department of Private Law, University of Oslo,
Karl Johans gate 47, 0162 Oslo, Norway
e-mail: geir.stenseth@jus.uio.no

© Springer Nature Singapore Pte Ltd. 2019

P. Babie and J. Viven-Wilksch (eds.), *Léon Duguit and the Social Obligation Norm of Property*, https://doi.org/10.1007/978-981-13-7189-9_6

build an egalitarian society with a strong welfare state and a protected and accessible natural environment as some of its cornerstones.

Léon Duguit's vision of a new legal approach entailed dismantling the *metaphysical and individualistic* legal system, and replacing it with a *realistic and social* system of law. And Norway is doing well: The Norwegian legal system, which to a large extent has abandoned comprehensive legal concepts and opened itself up for *real world considerations* as a valuable source of law, has for sure been transformed from a system that is metaphysical and individualistic to one that is realistic and social. Or maybe the Norwegian legal system never was sophisticated enough to become metaphysical and individualistic in the first place, but in reality it evolved from a primitive mix of legislation, precedent and (more or less) common sense, to a more advanced mix of ingredients?

The idea of law that underlined the Norwegian legal culture throughout the 20th century has been labelled *Nordic Realism*. That kind of realism has primarily appeared as *functionalism*. A majority of legal scholars have treated law as a tool to make social progress; law has been treated as a means to an end, or, if you like, *a social function*. Such an approach has kept legal scholarship *realistic and pragmatic*—theory and practise have been interlinked, and theoretical efforts have been cooperative with all three branches of government (Michalsen 2007, 121).

Scandinavian Legal Realism, on the other hand, was a jurisprudential movement to destroy the influence of metaphysics upon legal thinking and to provide the secure philosophical foundation for scientific knowledge of the law (Bjarup 2005, 1). This movement included a kind of formalism and absolutism that distinguished it from the pragmatic take of Norwegian legal culture (Michalsen 2007, 121), but has still been incorporated in mainstream legal scholarship and practice in an (unsurprisingly) pragmatic manner.

For sure, both Nordic Realism and Scandinavian Legal Realism are related to Léon Duguit's vision of law, and indeed his specific expression of it: to replace a *metaphysical conception of subjective right* by a *realistic and social system of law*.

Duguit's take on subjective rights shares with Scandinavian Legal Realism the attempt to "prove" philosophically that they cannot exist. Like the Scandinavians, Duguit claims that subjective rights rest on an unsustainable metaphysical and erroneous conception.[1] In particular, the Scandinavian legal realist Alf Ross relates to Duguit's philosophically based critique of subjective rights (Ross 1957, 817; Ross 1959, 186–188, 256–257).

Ross' view promoted the development of a *functional* property concept in Norway: a comprehension of property that manifested itself in the 1960s. According to this, the property concept is fundamentally an unnecessary legal one, as it lacks any empirical

[1] In fact, by reference to Auguste Comte, he claims that the concept of subjective rights represents "a contradiction 'in adjecto' … If man is examined isolated and wholly cut off from his fellow beings, he has no rights and can have none. … The individual, therefore, can have rights only so long as he lives in society and only by reason of the fact that he lives in society … And as we have already shown that man as a member of society can in reality have no subjective rights, the entire system of law based upon the conception of subjective right and the individualistic doctrine crumbles, destroyed by its own false premises." (Duguit 1918, 73).

referent. We need consider only the different functions that are incorporated in what has become known as property. Then, to speak of property is useful only as a collective *term* for pedagogical purposes.

An attempt to reject the idea of subjective rights by formalistic means may be interesting enough, theoretically, but it is what Duguit offers *instead* that really provides new legal tools: the "new system" that "rests upon a purely realistic idea […]: that idea is *social function*" (Duguit 1918, 73). So, even though an absolutist attempt to reject the idea of subjective rights may be hard to digest, the new system—a legal system aimed to carry "solidarity or interdependence by reason of similarity of interests"—is more intuitively sympathetic, at least viewed from present day Norway (Duguit 1918, 75).

Still, even in the late 19th century Norway Duguit's idea of law was easily adaptable. Even though the scarce contemporary Norwegian legal scholars had subscribed for some decades to the influential German legal constructivism (Begriffsjurisprudenz), there was a long tradition of *pragmatism*: a down-to-earth approach by legal scholars, including interplay between legal theory and legal practice, as well as interplay between legal and economic theory.

When Ihering sparked the sociological turn in legal scholarship, Professor Fredrik Stang (1867–1941), who was the leading force in the Norwegian reception of the sociological movement in law, earned extra traction by pointing back—beyond the constructivists—to "classic" Norwegian pragmatism. This was at the turn of the century, and Stang was certainly inspired by the sociological turn in French law and scholarship. In 1935 he wrote that a sociological view flows early into French legal scholarship: In reference to Comte, Tarde, and Durkheim, he concluded that sociology had affected legal scholarship as a whole (Stang 1935, 134).

We know that Stang made a scholarly visit to Paris in 1905, but there are no indications that he was in direct contact with any of the legal-sociologists during his stay in Paris. Neither have we found any direct reference to Léon Duguit in Stang's writings, and despite the remarkable influence the sociological movement had in Norway, there are scant references to Léon Duguit in Norwegian legal scholarship.

With one significant exception: Law Professor Ragnar Knoph (1894–1938). Knoph is regarded as one of the most influential Norwegian legal scholars (*the lawyers have treated him as a legal icon, genius and infallible*, as one of his biographers puts it) (Halvorsen 2002, 290). One of his advantages was that he was a skilled reader of the French language. In a time when much of the attention traditionally had been called to German law and legal scholarship, he made several scholarly visits to France, and his knowledge of French law put a distinctive mark on his writings. Knoph, who was a student of Fredrik Stang's, wrote a legendary textbook called "Oversikt over Norges rett" (*An overview of Norwegian Law*) (1934), which extended Stang's fundamental legal view. In his diary, Stang wrote that Knoph's book was built on a sociological and economic basis (Holmås 2006, 132).

Property law was not one of Ragnar Knoph's specialities, but in a 1927 article on anti-trust legislation, he summarized (much along the same lines as Duguit did in the Buenos Aires lectures) how the ideas of society and solidarity gained terrain over liberalism and individualism in legal scholarship as in legislation (Knoph 1927,

1025–1039). When it came to private law issues, he devoted the most space to contract law. But he paid an important visit to property law, including a distinct focal point: Léon Duguit.

In flattering terms he named Duguit one of the best known and probably one of the first who (– *with great talent and artistic life* –) gave an account of the transformation in question. Knoph praised Duguit's thorough and well known portrait of *the metamorphosis* of the subjective rights, first and foremost when it comes to *the prototype of subjective rights, real property*. From being a sacred and inviolable right, as expressed in the Declaration of the Rights of Man, comprising the uncontrolled individualism that unconditionally empowered the owner to use, or not to use, his property at the act of his own sweet will, Knoph emphasized that property law was rather transformed into what *Duguit in approval of Auguste Comte calls «une fonction sociale»* (Knoph 1927, 1038).

Knoph teams up with Duguit, claiming that the power to possess and use an object is given the owner because he is supposed to treat it in the best interest of the society. The exercise of the property rights becomes in fact a social function, and this shift does not only appear as limitations on the property rights, but also as a direct duty to use the object for the social aims by which the property rights basically are granted (Knoph 1927, 1038).

Maybe Knoph was provocatively edgy, but his perspective was by no means radical. As indicated, Stang paved the way in general terms. And when it came to property law, Law Professor (and later Chief Justice of the Supreme Court of Norway) Herman Scheel predated Knoph by emphasizing the common good as the foundation of the property concept. In "Norsk tingsret" (*Norwegian Property Law*) of 1912, he claimed that the aim of the common good is the fundamental reason why possessions are protected and recognized by society as property. Because of this, property rights can be exercised only within the scope of the common good, and that is why regulations on and limitations of property rights cannot be conceptualized as restrictions, Scheel emphasized. As much as we may talk about restrictions on the property owner, we may be talking about property as restrictions on the free utility of things by the society, Scheel claimed. Therefore, property rights are always bound to be defined by the legal limitations decided by the society in question; no more, no less (Scheel 1912, 18–21, 160–161).

Scheel made no explicit reference to Duguit. There is no doubt, however, that Scheel, like Dugiut, crowded out the metaphysical conception of subjective rights and conceptualized the idea of property as a social instrument. In line with this, he already in a 1907 article promoted the common good as the foundation and aim of any legal system, and, accordingly, he promoted *real world considerations* as a source of law (as a critique of the orthodox practice of squeezing new facts and practices into old narrow moulds at all costs, like Duguit put it) (Scheel 1907, 258–262; cf Duguit 1918, 117). In fact, the 1907 article was based on a lecture given as early as 1892 (speculations have been made that Scheel preferred to wait for a friendlier environment before publishing it) (Slagstad 2011, 320). In 1940 Scheel emphasized his viewpoint again, in an article wherein he reiterated that property rights can be exercised only within the scope of the common good (Scheel 1940, 137–138).

6.2 Legal Precedent

A landmark Supreme Court opinion that proved Knoph and Scheel to be on the right track was decided in 1918 (Norsk Retstidende 1918, 403). In that case, the Court considered the constitutionality of a new statute that put limitations on the free trade of property rights.

The Norwegian Constitution dates back to 1814. In fact, it is the second oldest constitution still in function (beaten only by the U.S. Constitution). Consistent with the constitution in general, the property protection clause—Article 105—was inspired by the Anglo-American and the French constitutional documents of the late 18th century. Like the Takings Clause of the Fifth Amendment, the Norwegian Constitution ensures that if property is taken for public needs, just compensation is to be granted: "If the welfare of the state requires that any person shall surrender their movable or immovable property for the public use, they shall receive full compensation from the Treasury."[2]

Unlike the continental European jurisdictions (notably France, as Duguit stressed), but similar to the situation in the United States, the legal concept of property had not been codified in Norway. Since the Norwegian Takings Clause does not offer any positive definition of property, the Norwegian legal concept of property has largely been designed by courts and legal scholars with a particular focus on the line between *expropriation*, which is subject to *mandatory compensation* (due to the Takings Clause) and *non-compensatory regulations*.

According to a 1909 statute, the owner of a waterfall would be allowed to sell the waterfall (for the purpose of hydroelectric power production) only on the condition that the property rights of the waterfall (including the hydroelectric power plant) would be transferred to the Norwegian state for free after 80 years. Due to this, a seller—who had got a lower price than he would have had without such a clause—sued the Norwegian government and claimed that the 1909 statute was unconstitutional and void, and if not, he claimed compensation. The Supreme Court found unanimously that the 1909 statute was not void. On the compensation question, there was dissent.

The minority of three justices recognized the right for the state to control and regulate property, *as long as* it did not affect *the substance* of property rights: the state could not make it *impossible or difficult* for the property holder to use their individual rights. The minority of justices claimed that social needs should not be fulfilled at the expense of the individual, as property rights rested on an autonomous foundation: *In my opinion, a legal view that private property, as subjective individual property rights in general, are granted as a gift of grace by the state, is alien to the spirit of the Constitution* (Norsk Retstidende 1918, 403 at 409).

---

[2]The Constitution of Norway was laid down on 17 May 1814 by the Constituent Assembly of the Stortinget [The Norwegian Parliament] at Eidsvoll and subsequently amended, most recently in May 2016. It is accessible at: https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf. Accessed 26 January 2018.

But the *majority* of four justices held that property rights are exclusively defined by the legislation at any given time. The only limitations the legislator has to obey are the limitations set forth in the constitution. The majority argued, however, that the Norwegian Constitution did not recognize any individual right for the owner to utilize their property rights as they wish: Article 105 did not protect what had been named *the substance* of property rights (namely, its essence or inner nature). What the constitution protects, the majority reasoned, is the right to be compensated in the case of expropriation. And that is the case when the state takes property away from the owner, but is not the case when the state—in the interest of the society—prohibits a certain use of property or otherwise regulates how the property holder legally may—or must—use their property rights.

It was settled. Property had been transformed from uncontrolled individualism into «une fonction sociale», as Knoph put it in the 1927 article. The focal point was no longer "the absolute and exclusive quality of property," "absolute in duration and in effect," as "power to enjoin upon others respect for my will to employ as I choose the thing that I possess as owner," as Duguit had recapitulated it (Duguit 1918, 70, 131). Property was now treated positivistically in Norway; the focus had shifted to text interpretation. Fundamentally, the state had assumed the power to design property rights in ways that best serve society. The only limitations on that power were positively created by the constitution, and were operationalized by interpreting the wording of the constitution, not by speculations on an a priori absolute and exclusive quality of property.

The Supreme Court has, for the most part, stuck to this principle until the present, in the sense that there are almost no constitutional restrictions on the parliament's power to regulate property without paying any compensation to the owner. In fact, the ruling of 1918 paved the way for natural area and natural resource preservation on a large scale in Norway—also in reference to privately owned land. Such preservation could happen at a low cost for the Norwegian government, and today over 17% of mainland Norway is protected in such a way.

The Supreme Court judgement of 1918 is an interesting example of both the strengths and weaknesses of Duguit's approach. He was at the forefront of challenging private law concepts by not only bringing public law elements into the private law sphere, but also by arguing that public law considerations ought to be the foundation and lodestar for the whole body of private law. The Supreme Court majority rested its opinion on such a deconstruction of private law—in particular its property concept. It refused to rely on the *substance*, *inner nature* or *essence* of property as guidelines. Instead, limits were indeed put on the property rights in question due to apparent, substantial, threats to future social and economic developments, threats that the *legislative branch had deemed necessary to protect the society against* (Norsk Retstidende 1918, 403 at 406).

So far, so good: The old, *metaphysical* comprehension of property was rejected to facilitate a *social function* of property. But thereafter, the Supreme Court majority departed from Duguit's approach. It stated that courts have no mandate to evaluate the legislator's social considerations, or to determine if the legislator had assessed the real, or possible, threats correctly. In other words: The Supreme Court left it entirely

to the legislator to decide how property ought to serve a social function, within the limits of the text of the constitution (Norsk Retstidende 1918, 403 at 406).

According to Duguit, however, equalizing law to the text of the constitution and the legislation at any given time did not represent *the* "fonction sociale." His vision of law was heavily influenced by Emilie Durkheim's ideas. Julius Stone, for instance, points to how closely Duguit's criterion of justice is interlinked with his view on law and society, and how he comprehended the latter relationship in line with Durkheim: That the progress of human society presents a shift to organic society, based on highly specialized heterogeneity of functions. Thus, law becomes an instrument for securing and regulating the operation of a complicated but close-fitting system of specialized functions (Stone 1965, 161):

> However, each individual has a certain function to perform in society, a certain task to fulfil […] [A]ll acts contrary to the function which devolves upon him will be restrained by society; but all his acts done to further the mission which is his by reason of his position in the community, will be protected and guaranteed by society. Herein appears very clearly the social basis for a specific rule of law or for objective law. It is both realistic and social: realistic, in that it rests upon the fact of social function observed and proved at first hand; social, in that it rests upon the essentials themselves of social life (Duguit 1918, 74–75).

This implies that the legislation itself, and even the constitution, have to be subject to the social function test. And, as Julius Stone puts it, Duguit "pushed these ideas to the point of saying that even the supreme legislator is in no different position, so that (independently of any written constitution) these acts do not bind unless they conform to social solidarity—*la règle de droit*" (Stone 1965, 162).

How to conduct such a test is another question. Duguit calls on "the State, the voice of objective law" to interfere to forbid actions that are not consistent with the social function imperative: "Where the State does so it impairs no so-called right, but simply applies the law of social solidarity, which is the fundamental law of all modern communities" (Duguit 1918, 80–81). Then, the courts should assumingly apply the law of social solidarity as an ultimate check on all cases brought before them. According to Stone, Duguit suggested in fact ("rather vaguely") that the courts should have the power of striking down statutes inconsistent with the social function imperative (Stone 1965, 163).[3]

So, when the Norwegian Supreme Court backed off from evaluating the legislator's social considerations, it did not fully implement the social solidarity test. In fact, it rather indicated the purified Norwegian legal realism of the post-World War II era, in which law—and the courts—acted as an *instrument* for social progress rather than claiming the *power to define* such a social concept.

The Norwegian Supreme Court's approach also points to a striking paradox of Duguit's philosophy. After throwing out every *natural right* and *metaphysical conception* of law, the courts were supposed to tackle a different vague imperative, the *social function*, the *law of social solidarity*. This is a demanding task, to say the least.

[3]Stone adds that Duguit even proposed "for this purpose the establishment of 'a high tribunal composed equally of representatives of all the social classes, which would judge, so to speak, of the legality of the law'" (Stone 1965, 163).

Such a test might easily be comprehended, like Julius Stone, as "an inaccessible mystery to the end", in many ways similar to Ihering's social utility concept (Stone 1965, 158). Yes, social solidarity and social utility do direct our attention to important facts that must be considered, but neither provides a measure of the values necessary to complete the judgement: "Duguit stopped short of enumerating the concrete dictates of his principle of social solidarity just as Ihering stopped short of enumerating the dictates of social utility" (Stone 1965, 165–166).

Obviously, the Norwegian Supreme Court did not find it tempting to take on a vague social function test, neither for legislation, nor for the constitution.

6.3 Public Law—Legal Standards

But Ragnar Knoph—the Duguit supporter—was clearly not satisfied. In his view, a sort of social function test would have improved and made the property concept in Article 105 of the constitution less dichotomous. On the one hand, it had become too harsh on owners whose property rights were almost seized, but not taken, by regulations; on the other hand, it might grant too generous a compensation in certain takings situations, according to Knoph (Knoph 1939, 110–113). Furthermore, the dichotomous perspective on the property concept would also spill over to the traditional private law sphere, thus remaining too stiff and inflexible to serve a proper social function.

Inspired by (among others) Roscoe Pound, Knoph saw a *legal standard* approach as a means to operationalize a social function test for property rights. In the landmark 1939 book "Rettslige standarder" (*Legal standards*) he promoted a legal standard approach to the constitutional ban on retroactive legislation (Constitution Article 97) as well as to the Takings Clause in Article 105.

If Article 105 of the constitution were to be treated as a legal standard, it would become applicable to regulatory takings situations as well. And by the legal standard approach (in stark contrast to the minority in the 1918 case) Knoph did not need to rely on any universal autonomous foundation of property rights to justify *regulatory takings compensation*: the legal standard approach would provide the courts with tools to grant compensation on a case-by-case basis (Knoph 1939, 111–112).

As a point of departure, Knoph called attention to regulations that are *significant*, and as such should be subject to compensation, as opposed to *insignificant* regulations that the owner should tolerate without compensation. However, such a guideline—*significant*—he admits would be too broad and vague to become a real legal standard: surely a legal standard is not equal to mere unbound judicial discretion. Knoph claimed that a legal standard refers to a certain scale, and that scale is created by social norms (Knoph 1939, 4).

Citing Pound, he offered three defining characteristics: (1) Legal standards involve a certain moral judgment upon conduct: It is to be *fair*, or *conscientious*, or *reasonable*, or *prudent*, or *diligent*. (2) Legal standards do not call for legal knowledge exactly applied, but for common sense about common things or trained intuition

about things outside of everyone's experience. (3) Legal standards are not formulated absolutely and given an exact content, either by legislation or by judicial decision, but are relative to times and places and circumstances and are to be applied with reference to the facts of the case in hand. They recognize that within fixed bounds, each case is to a certain extent unique (Knoph 1939, 3–4).

However, Knoph was somewhat reserved when referring to the first characteristic—the idea of *moral judgment*. In his opinion, that might imply too narrow a norm. The norm should be more like *proper social behavior*, for instance what is *customary* or *likely* behavior. That would represent social norms in a wider sense: not necessarily moral norms (Knoph 1939, 4). By this, Knoph's theory would enable the courts to administer a sort of social function test, but under full consciousness of that the judges "clearly understand that it is a standard they are applying" (Helgadottir 2006, 121).

As Ragnhild Helgadóttir has thoroughly pointed out, Knoph was not influenced by Roscoe Pound alone. In fact, he directly connected his legal standard theory to the contemporary constitutional situation in the U.S. Let's pay attention to his own words:

> The development in the United States is very instructive to us Norwegians. Even though the form is different, the guarantees of the Constitution have the same practical goals and nature and they can be interpreted in two different ways, no matter on which side of the Atlantic: Either as rigid, absolute legal rules trying to fence in legislation once and for all or as flexible standards that are capable of evolving and try, in changing times and changing circumstances, to realize the ideal of justice between the state and the people. With plastic clarity, the American developments show us the results of these two alternatives: While the Constitution was interpreted as a standard everything was peaceful. But when the other understanding won majority in the Supreme Court and was practiced for years, with dire results, the picture changed (Helgadottir 2006, 122).

Only after President Roosevelt's court-packing plan (*a most doubtful move only legitimized as a last resort in a dangerous, revolutionary, situation*) (Knoph 1939, 187–188), the justices *put their ears to the ground* and switched back, (Knoph 1939, 190) Knoph warns us, cautiously stating that *how deep and lasting the switch the Supreme Court made in the eleventh hour is still too early to say* (Knoph 1939, 190).

Then he made his case for Norway, reflecting the U.S. situation to the Norwegian 1918 case: "The interpretation method in 'classical' constitutional theory speaks for itself, and no less expressive are the dissenting opinions in the waterfall cases" (Helgadottir 2006, 122–123). If the viewpoints of the minority yet again would become reality, it would have had the same consequences as in America, he argued. In fact, as Helgadóttir puts it, Knoph used the American contemporary constitutional history to make a threat: "were the courts to interpret the constitution rigidly, they would come into a conflict with the legislature that they could only lose, possibly at great loss to the constitutional order as well" (Helgadottir 2006, 123). The bottom line was that courts must always remember that the standard of justice is dependent on the times and circumstances and is not static (Helgadottir 2006, 121–122)—in short, that they should subscribe to the legal standard approach.

The time eventually came for Ragnar Knoph to identify the scale to which governmental property regulations should relate. How do we know whether compensation should be granted or not? Of course, if the regulations made property useless or deprived it of all economic value, that created a strong argument for compensation. If the aim of the regulation was to prevent harmful or dangerous use of property, that created a strong argument against compensation. Further, the principle of equal treatment was essential to the Norwegian Takings Clause: if the regulations favored just a small group of people, that, too, created an argument for compensation (Knoph 1939, 119–128).

These guidelines do not appear to be radical. But Knoph's fundamental principle, that it is the role of the courts to check and ultimately decide if different legal outcomes were in accordance with the times and circumstances—with social solidarity front and center—was an exhortation to the judiciary that was not necessarily uncontroversial. As Helgadóttir emphasizes, despite the 1918 case, the Norwegian courts had been accused to be insensitive to changes in society and too solicitous of the interest of property owners: "These accusations were levied in political discussion and legal theory and they led to constitutional amendments being proposed to either expressively prohibit judicial review or to repeal the prohibition of retroactive laws in Article 97, the takings clause in Article 105, or both" (Helgadottir 2006, 123–124).

A 1923 parliamentary debate on these measures exemplifies the point. One proponent of the amendments pointed to the hard-fought enactment of the statute prohibiting waterfalls to be sold unless they were transferred to the Norwegian state after 80 years. The fact that such a progressive measure (– *to the benefit of the people's happiness and the prosperity of the country* –), had nearly been voted down in the Supreme Court clearly showed that judicial review and the Takings Clause were not only a guarantee of social conservation, but rather reactionary in the worst sense of the word (Sandmo 2005, 139). Another member of parliament—the later Chief Justice Emil Stang—followed up similarly harshly (Sandmo 2005, 139). When the motion was debated in the parliament's plenary session in 1925, the votes of the 1918 case were still a main subject. One Member of Parliament argued that judicial review was no better than a lottery: if only one justice had changed his mind, it would have created *dire and unforeseeable consequences for the state economy*. The later Supreme Court Justice Johan Castberg—another Member of Parliament—joined in (Sandmo 2005, 146).

However, the proposed amendments failed (101 parliament members voted no, 33 voted yes), presumably because prohibition of retroactive laws and basic property protection were comprehended as fundamental legal principles, not only by the elites, but by the general public (Sandmo 2005, 147). It was also pointed out that abandoning judicial review in Norway would be contrary to the general tendency in Europe, where judicial review was acknowledged as a constitutional measure (Sandmo 2005, 142). Similar constitutional amendments were proposed later as well, on several occasions: the last one in 1935. All of them were voted down (Sandmo 2005, 140).

So, when the book "Rettslige standarder" was published in 1939, the strong controversies had somewhat faded away. In fact, during the 1930s the Supreme Court justices reached out to interpret new statutes to be consistent with the constitution,

paving the way for Knoph's theory of constitutional legal standards. In turn, Knoph's book consolidated the path of cautiousness and flexibility, and made a contribution to the fact that the heated discussions on judicial review did not relight (Sandmo 2005, 167). In 2014, at the bicentennial of the constitution, a judicial review clause was even formally amended without any substantial debate (Constitution of Norway, Article 89).

On the other hand, the Supreme Court's judicial deference to the legislator was, as indicated, not consistent with a true *social function test*. When it came to property, the court did not pick up on Knoph's recommendation to mute the dichotomy between takings and mere regulations, but continued to avoid evaluating the social considerations of the legislator, leaving it to the parliament to define property's social function. In fact, for a long period of time, courts did not strike down any property regulation (until a landmark case in 1976, in which the Supreme Court made it clear that the fair market value still remains the constitutional benchmark for takings compensation) (Norsk Retstidende 1976, 1).

That said, from a Léon Duguit point of view, there might be no reason to act differently for the Norwegian courts. There was a mainstream understanding by all the branches of government to promote social progress, and a large majority comprehended heavy regulations on property as a legitimate tool to reach that aim. For decades, the idea of property as a social function was incorporated into society by the legislative and executive branches. The doctrine of leaving it to the democratically selected representatives to decide on how property would best serve its social function was in fact a vital part of that process.

6.4 Private Law—Legal Standards

In Léon Duguit's vision, the *purely individualistic conception* of law had to be replaced by a *realistic and social system*. The main misfortunes of the old conception in the sphere of property rights, he argued, were various aspects and consequences of its absoluteness: in respect to both public power and private interests, as well as to duration (Duguit [trans: Viven-Wilksch J] (2019), 39; cf Duguit 1918, 132).

He pointed out that property had been comprehended as absolute "towards the public power which can well impose some restrictions in the interest of regulation, but can only do so by paying a just indemnity beforehand" (Duguit [trans: Viven-Wilksch J] (2019), 39; cf Duguit 1918, 132). We have already discussed that aspect.

Now we turn to how Duguit addressed property—and its absoluteness—within the classic domain of private law. He stressed that the absoluteness of the old conception empowered the property owner with "the right to not use it, not enjoy it, not dispose of it and consequently to leave his land without cultivation, his urban sites without construction, his houses without tenancy and without maintenance, his movable capital unproductive" (Duguit [trans: Viven-Wilksch J] (2019), 39; cf Duguit 1918, 132). This leads me to discuss how Duguit's inactivity problem has been treated

within Norwegian private law. To no surprise, Ragnar Knoph continues to play an important role.

Make no mistake; the concerns about leaving property unused have mainly been dealt with within the sphere of Norwegian public law. For instance, the legislation has long since mandated any owner of agricultural land to cultivate and use it. Ignoring this would ultimately lead the authorities to carry through a forced sale of the property in question. The owner's duties were, in fact, constrained yet further by statutory amendments as late as 2009.

In legal relations between private parties, however, leaving property unused rarely had consequences outside the domain of the traditional legal concept of adverse possession (and some additional scattered provisions here and there) at the time Duguit's Buenos Aires lectures were published. Despite promoting the common good as the proper foundation of the property concept, even Law Professor Herman Scheel continued to adhere to the classic view that a *property right does never cease to exist due to lack of use* (Scheel 1912, 381). In fact, at the time, this was considered a fundamental truth, beyond limits of discussion (Knoph 1939, 201). Still, from time to time, the courts were exposed to cases in which the doctrine would lead to consequences so unequitable that the courts circumvented it altogether, by constructing a contractual relationship or deferring to the abuse of rights maxim.

For sure, an approach like this—a hiding of the facts of the matter—was not satisfying to the progressive mind of Ragnar Knoph. As we know, in 1927 he praised Duguit's *metamorphosis of the subjective rights*. Subjective rights were granted to the owner only to act in the society's best interest. As Knoph puts it, *this shift does not only appear as limitations on the property rights*, *but also as a direct duty to use the object for the social aims by which the property rights basically are granted* (Knoph 1927, 1038). He picks up on this in the late 1930s, in the book "Rettslige standarder", elaborating it into a full blown private law theory of loss of *individual* (or *subjective*) rights due to inactivity.

However, in between the publication of the 1927 article and the book, a young Norwegian legal scholar named Carl Jacob Arnholm had published a treatise called "Passivitetsvirkninger" (*Legal consequences of inactivity*) (1932). There, he looked into the possibility of incorporating different legal aspects of inactivity into a general legal concept. He was struck by the fact that the idea of inactivity had forced its way into modern law: *It was as though society itself tried to make inactivity into one of the fundamental concepts on which the legal order rest* (Knoph 1939, 202). But in the end, Arnholm seemed to resign. He found himself unable to phrase such a concept without adding so many exceptions that it would undermine the project. Arnholm eventually resolved merely to describe a legal tendency. Despite this, Arnholm's book made an impact. Knoph praised it for identifying a legal development toward a more transparent use of inactivity as a legal argument (Knoph 1939, 213), but the criticism came: *To quit in an untimely manner is a great sin*, Knoph stated, with reference to Arnholm, and set out to fulfil the enterprise to create a new legal standard: inactivity.

I relation Léon Duguit's project, the legal reasoning Knoph unveiled during his enterprise is maybe the more interesting one, rather than the end result. The foundation for his effort was a sociological perspective, Knoph stated: *the forces that give*

rise to the inactivity problem and makes its character (Knoph 1939, 224). Obviously, Knoph took his point of departure in the discussion of subjective rights. He stated that subjective rights were no longer identified as an idea a priori, but instead rested purely on rational and practical considerations by the legal order. Subjective rights did not exist to materialize dead and abstract principles of the autonomy of the will, but rather to protect living and concrete interests, and in particular interests that had been found worthy of protection by the legal order (Knoph 1939, 224).

So, Knoph asked, which were the grounds that made an inactivity standard to force its way into modern law? The fundamental rationale for granting individual property rights was to enable the owner to use and protect the object in question. Thus, any non-use was in principle contrary to the social function of individual rights. And the drawbacks for society became more significant as time went by, not only because disadvantages of unproductivity added up, but also because society—like other *organisms*, Knoph added—was in a constant state of change (Knoph 1939, 226).[4] For instance, the normal psychological reaction to a longer period of non-use was that the right was comprehended as non-existing by others. By this, inactivity created a *social value* for the rest of the society that the law could not ignore, but one rather had to ask: How would a reasonable and diligent person—with a social sense of duty and respect for interest of the other—act if they expected to keep their legal position? Knoph concluded that this standard—*acceptable social behaviour*—was the standard that inactivity had to be related to when the courts assessed whether an individual right should be continued (Knoph 1939, 238).

When time and social development create new social interests in the object in question, the inactivity standard in fact promotes a kind of *dynamic certainty*, calling for legal protection, Knoph claimed (Knoph 1939, 254). Such a standard encompasses the solidarity and interdependence that society needs: in contrast, an absolutist approach to property rights—to let the owner treat their possessions entirely and ruthlessly to their own likings—would indeed imply an element of *anarchy*, Knoph argued. And as acceptable social behaviour constantly evolves toward social responsibility, the inactivity standard would become increasingly stricter, he stated (Knoph 1939, 269). The argument is unmistakably evocative of Duguit's influence.

Knoph's book manuscript was finished some ten years after the 1927 article, in which he acclaimed Léon Duguit and his take on the property concept. In the intervening years, Knoph had also expressed his admiration for Duguit to the general public. In 1934, the Norwegian national radio broadcasted one of Knoph's lectures on the developments of international and national modern private law (Knoph 1934). He emphasized the fundamental shift that was going on in property law, from an individualistic to a social purpose, and gave a series of domestic examples of how the new approach had found its way into legislation: there were regulations on hunting, timber production, house building, etc., not to mention restrictions on the freedom of contract concerning real property. He went on to mention how farmers and forest owners were obliged to grow food and cultivate their woods, all to serve the needs of society in the best possible way (Knoph 1934, 20–23).

[4]Note that Knoph, like Duguit, subscribes to "a certain biologism" (Brunet et al. 2016, 424).

Indeed, Knoph did not claim that his legal analyses were original: they had long since been treated academically, he admitted, referring to Auguste Comte and Léon Duguit in particular. Léon Duguit, he continued, firmly claimed that subjective rights belonged to the past, and had changed into *social functions*, i.e., functions commissioned to the individual by society to be conducted on behalf of society, for society's benefit. However, such a total change had not yet happened in Norway, Knoph pointed out, as property rights could still be exercised more feely and uncontrolled than the theory of social function would lead to. Still, Knoph expressively subscribed to Duguit's claim that the duties of the property owner towards society undoubtedly had become an integrated part of private law: *By all means, the new social spirit of law is continuing to reshape subjective rights from being individual prerogatives into tools in societal service* (Knoph 1934, 131–132).

However, Ragnar Knoph's inactivity standard hardly gained traction in Norwegian law. It was later claimed to be too vague, or even meaningless (Asland 2009, 74). Like Duguit's broad social solidarity test itself, the inactivity standard comprised important facts to consider in the legal evaluation, but fell short to provide the value measures necessary to complete the judgement. On the other hand, some of the elements incorporated in the standard have later become a part of Norwegian property law.

After World War II, the Norwegians attempted to codify private law.—If fact, this was the second time the Norwegians had done so, with the first occasion taking place in 1814. Norway had been in a union with Denmark for some 400 years, and Denmark-Norway teamed up with Napoleon in the Napoleonic Wars. As Napoleon lost the Battle of Leipzig, the Norwegians took the opportunity to leave the union, making its own, modern, constitution at the 17th of May 1814. The founding fathers of course subscribed to the separations of powers doctrine and very much wanted the legislature to codify the law of the new nation. Article 94 of the constitution stated that plan: Within one or at most four years, a civil and criminal code should be enacted. This would promote certainty and unity in the legal system, and secure the separation of powers in the spirit of Montesquieu. However, the plan of making a civil code was abandoned in the mid-1800s. The small Norwegian legal community was not strong enough to fulfil the enterprise (Michalsen 2011, 357). Instead, the parliament issued single statutes. One of them was the nuisance law statute of 1887, which mandated property owners to take into account the interests of their neighbors when exercising their rights. In fact, that nuisance legislation dealt a significant blow to the principle of property as an absolute right, in Ragnar Knoph's opinion (Knoph 1934, 21).

Anyway, right after World War II, the government once again expressed an ambition to codify private law. Again, the idea proved to be too ambitious, and was scaled down to the enactment of single statues on various private law aspects, mainly concerning property law. During the 1960s, in addition to legislation on *adverse possession*, new statues were enacted on *private nuisance law*, *co-ownership*, and *servitudes*. An expert committee had been created to prepare the legislation, called "Sivillovbokutvalet" (*The Civil Code Committee*), which—as indicated above—incorporated some of the elements of Knoph's inactivity standard.

Sivillovbokutvalet wanted to balance the use of real property in the best way possible for society against legal certainty for the holder of property rights. Accordingly, it proposed that property rights should be interpreted with due regard to social changes that would occur after the disputing parties (or their legal predecessors) entered the legal relationship in question. For sure, the committee paid a courtesy visit to Roman law: When it drafted the servitude statute, the committee discussed the concepts of *servitutes prædiorum*, *utilitas fundo* and *perpetua causa*. However, it pointed out that strict Roman concepts such as these had traditionally never been a part of Norwegian law, where the law of servitudes had emerged on the basis of customary law and judicial precedent. The committee also argued that it would be ill-advised to found the new legislation on Roman concepts, which were created in a static social context: *The classic ideas of for instance utilitas fundo and perpetua causa would rather be misleading in our time*, it stated.[5]

Instead, the committee chose a dynamic and progressive approach: It argued that social change would only accelerate in the future, and that the function of servitude law had to adapt. Likewise, when the committee drafted the private nuisance statute, it referred to rapid social changes, and emphasized that the nuisance statute needed to be designed to promote optimal use of the landed recourses, including preventing the owner from exposing unjust harm and inconveniences.

To be able to get the flexibility needed without unleashing courts entirely, the committee proposed to codify a legal standard—*unreasonable and unnecessary*—that in turn was enacted by parliament. According to the standard, the property owner may not impose unreasonable and unnecessary harm or inconveniences on their neighbors; the property owner and the servitude holder have a mutual duty to refrain from using their property rights to impose unreasonable and unnecessary harm or inconveniences to the other; and similar duties are also valid in respect to co-owners.

As already indicated, one important guideline for the judges when assessing the standard, is to adapt their judgements to social changes. In the legislation on servitudes and co-ownership, that guideline is expressively stated in the statutes (using terms such as *in accordance with changing times and circumstance*), while private nuisance law is subject to an analogous guideline due to judicial precedent. In particular, changes that are backed by governmental policy might more easily be categorized as reasonable and necessary—thus legal.

To exemplify, let me use a private nuisance case that the Norwegian Supreme Court decided in 2011. An owner promoted the establishment of a wind turbine park for electric energy production on his property (Norsk Retstidende 2011, 780). Then, a neighbor claimed that the enterprise would have unreasonable and unnecessary negative effects on his property. However, the neighbor did not successfully convince the judges. A unanimous court held that increased energy production from wind power had been a prioritized governmental policy for many years, and that the technological and commercial development had enabled wind power to cover partly the domestic demand for electric energy. Thus, the enterprise was part of an

[5]NUT 1960: 1 Rådsegn 5 Om særlege råderettar over framand eigedom, 31.

important social change, which was held to be of substantial importance when the *unreasonable and unnecessary* standard was applied in the case. The fact that the wind turbine park was situated in a relatively untouched natural environment was (expressively) of no relevance to the court, because such enterprises typically had to be set in areas exactly like that.

The decision is a good example of how the private-public law division has blurred in Norwegian property law, as—exactly—the *social function* of property has become an integrated part of private law (as Duguit suggested). A formal step that cemented this was an amendment to the legislation on private nuisance and servitudes in 2009. In addition to the aforementioned guidelines to the *unreasonable and unnecessary* standard, an extra guideline was added: biological diversity. When assessing a private nuisance dispute or a dispute between the property owner and the servitude holder, the judge is in fact mandated to evaluate what effects the different outcomes of the conflict will have on biodiversity in the area in question, and the effects (positive or negative) have to be taken into consideration as one of the factors of the total assessment. And, in fact, the wind turbine park case from 2011 does not contradict this. Initially, the neighbor's areas were planned to be part of the park, but he did not want to participate in the project. However, the environmental impact assessment that was made as part of the planning process discovered that the neighbor's areas were a Southern Dunlin habitat. Since the Southern Dunlin occurs on the IUCN red list of threatened species for Norway, it was not desirable to make the habitat a part of the windmill park. And the poor neighbor had to cope with yet another argument against his nuisance claim: The chosen area for the park was preferable also with regard to biodiversity.

So, when it comes to co-ownership, private nuisance and servitudes, the legal flexibility provided today—a sort of social utility test—would surely please both Léon Duguit and Ragnar Knoph. However, inactivity on the part of the property owner has not per se become a part of Norwegian property law. That said, there is a long and strong tradition for the concept of *adverse possession*. Both ownership to property as well as servitudes might be lost, and acquired, due to the adverse possession legislation. Under the standard conditions, the adverse possessor needs to possess the land, acting as an owner or as a servitude holder in good faith, for 20 consecutive years (for servitudes the time span is extended to 50 years under certain conditions).

Despite the strict minimum timespan expressively stated in the legislation, in some rare occasions the courts have ruled against a property right holder who has been inactive for fewer than 20 years. As indicated, the courts have not made precedent for a broad inactivity standard, as Knoph promoted, but have still made an opening for supplementing the adverse possession legislation where there are *compelling reasons* to do so. The most recent case of this nature, from 2015 (Norsk Retstidende 2015, 1157), may in fact imply a progressive attitude to the case law: A co-owned cabin had been badly maintained for years, and in 1992 one of the co-owners, Mr. Nilsen, set out on his own to remodel it. Eventually he did succeed; after 18 years of monetary expenses and personal labor, the cabin was standing there as though it was brand new. Then the co-owners entered the arena. After 18 years of silence and

inactivity, they claimed that they still were owners of their shares in the cabin, as they had never abolished their property rights. They didn't oppose Mr. Nilsen's argument that he spent time, money and energy on the cabin to remodel it, but they asserted property rights never cease to exist due to lack of use, and that Knoph's inactivity standard had never prevailed in Norwegian law.

Since Mr. Nilsen's remodeling project fell short of the 20 years rule of adverse possession, he had to relinquish that argument, and defer to the *compelling reasons* precedent. The majority, three judges, ruled in favor of Mr. Nilsen; two judges dissented. The majority opinion and the dissenting vote display interesting sets of deviating considerations. While the majority emphasizes subjective expectations of the parties, the minority emphasizes legal clarity and certainty. The most interesting aspect of the opinion, however, is how they considered individual fairness as a source of law. The majority agues plainly—without any further explanation—that its outcome is a fair one; it clearly considers fairness as an independent source of law, alongside legislation and precedent. The minority, however, states that the fairness argument would not be decisive on their part.

Let's return to Ragnar Knoph. By his inactivity standard, acceptable social behavior should be the focal point at which courts assess whether an individual right should continue—in particular, when time has created new social interests in the object in question, the facts themselves call for legal protection. Acceptable social behavior is closely interlinked with the notion of fairness. The 2015 ruling in the co-ownership case may imply a renewed emphasis on acceptable social behavior on the expense of the individualistic, right based, approach to property law: No doubt, the fellows Knoph and Duguit would absolutely not mind.

6.5 Present Day Situation—Conclusion

During the past decade, the social function approach to property has been challenged in Norway—not from inside, but from Europe. This is why:

In the first part of the 19th century, limited resources for the purchase of real estate made ground lease arrangements attractive for Norwegians who wanted to own a permanent home or a holiday home. There exist between 300,000 and 350,000 ground lease contracts, the majority of contracts being for private homes. Under these arrangements, the lessor is the site owner and the lessee owns the buildings on the lot. Typically, such leases concluded after a period of 60–100 years.

In 2004, the parliament adopted the rule that the lessee, when the term of lease expired, could demand an extension of the lease on unchanged conditions, including unchanged ground rent. This meant that homeowners and cabin owners could continue to renew the lease without ever giving the landowner a chance to renegotiate the contract (or ground rent).

The legislation was challenged as unconstitutional, but in a 2007 ruling the Supreme Court held it constitutional (Norsk Retstidende 2007, 1281). The reasoning was compelling social housing considerations, as the Supreme Court held that the

case had to be adjudicated pursuant to Article 97 of the constitution—which prohibits unreasonableness by *retroactive legislation*—and not according to the Takings Clause (Article 105).

Since the legislation involved a *transfer* of rights to the property beyond the contractual period, the court admitted that it could hardly categorize it as merely property regulation: According to the 1918-interpretation of Article 105 transfer of property rights would call for compensation. But the court circumvented Article 105—and saved the legislation—by falling back on the *social function* approach of Ragnar Knoph. In his 1939 book "Rettslige standarder" he had foreseen such a constitutional problem, and claimed that mandatory extensions of contractual obligations should not be categorized as expropriation, but should rather be tried against the doctrine of *retroactive legislation* under Article 97. Furthermore, when it came to the constitutionality of extending real property contracts, the legislation had to be judged according to the *social context,* Knoph had (unsurprisingly) claimed, leading the Supreme Court to cite him: *to possess real property is basically a social privilege, to which regulation from time to time is imperatively necessary* (Norsk Retstidende 2007, 1281 at 91–92; cf Knoph 1939, 162).

The case was brought before the European Court of Human Rights (ECtHR), which unanimously held that the Norwegian legislation was contrary to the property protection clause in the European Convention of Human Rights (ECHR P1-1) (*Lindheim and others* v. *Norway*, applications nos. 13,221/08 and 2139/10, decision June 12, 2012). The gist of the ECtHR's grounds is that even if the relevant provision in the Ground Lease Act is part of a social protection of lessees and as such legitimate, such social policy must be reviewed against a requirement that community interest in such protection shall be in reasonable proportion to the burden owners must bear, according to the fundamental protection of property rights that apply in Europe. In this case, there was not a fair distribution of the social and financial burden involved but, rather, the burden was placed solely on the property owner.

A new rule has now been adopted in Norway that, upon extension, the lessor may demand a one-off adjustment of the annual rent, so that it corresponds to 2% of the land value (there will still be a "ceiling" for what the ground rent may amount to per year, set to NOK 9.000 per m^2). This rule shall ensure the landowner a reasonable return, measured in relation to the increase of land value.

The ECtHR ruling ended a Norwegian tradition of almost 100 years that its national legislation and constitution at any given time exclusively define legal property rights. And, yes, ECHR P1-1 is inspired by what Duguit would call the subjective right of the owner. Still, it is pretty far from the "principle of the inviolability of *property*, understood as the absolute right to use, enjoy and dispose of a thing," as he fought (Duguit 1918, 78). The ECtHR applies a dynamic fair balance test between the individual and the general interest, and states are granted a wide margin of appreciation. In contrast, Duguit promoted a dichotomy—*property is not a right, it is a social function*—an approach much like the one adopted by the Norwegian Supreme Court in 1918. Maybe an approach like that fulfilled its function at the time, but times change, and law has to adapt—"surrender to the force of facts," as Duguit

put it himself (Duguit 1918, 93). These days it is more suitable to view property in a more nuanced way, as both a right and a social function, as does the ECtHR.

Knoph, too, never went as far as endorsing Duguit's extreme formulation. Knoph observed that the *exercise* of property rights had *become* a social function. But that *metamorphosis* did not eliminate property rights. It recreated them on a new foundation that made grounds for a functional, dynamic, approach. And, in fact, let's not forget that Duguit himself made important modifications to his extreme formulation of what property is:

> Just as well, I really care to avoid here any misunderstanding. I do not say, I never said, I have never written that the economic situation which is individual *proprieté* disappears, should disappear. I only say that the legal notion upon which its social protection rests is changing. In spite of this, individual *proprieté* remains protected against any infringement, even those that would come from the public power. And much more, I would say that it is even more strongly protected than with the traditional conception (Duguit [trans: Viven-Wilksch J] (2019), 46; cf Duguit 1918, 134).

References

Books and Periodicals

Asland J (2009) Passivitet som bortfallsgrunn for forpliktelser og ervervsgrunnlag for rettigheter i familie- og arveretten. Tidsskrift for Rettsvitenskap 122:70–102

Bjarup J (2005) The Philosophy of Scandinavian Legal Realism. Ratio Juris 18(1):1–15

Brunet P, Champeil-Desplats V, Millard E et al (2016) 20th-Century Legal Philosophy in France. In: Pattaro E, Roversi C (eds) A Treatise of Legal Philosophy and General Jurisprudence. Legal Philosophy in the Twentieth Century: The Civil Law World, vol 12. Springer, Dordrecht, p 411

Duguit L (1918) Changes of Principles in the Field of Liberty, Contract, Liability, and Property. In: Wigmore JH, Borchard E, Pollock F et al (eds) The Progress of Continental Law in the Nineteenth Century, vol XI. Little, Brown and Co, Boston, p 65

Duguit L [trans: Viven-Wilksch J] (2019) Sixth Lecture—La Proprieté Fonction Sociale. In: Babie P, Viven-Wilksch J (eds) Léon Duguit and the Social Obligation Norm of Property: A Translation and Global Exploration. Springer, New York, p 35–61

Halvorsen M (2002) Knoph, Ragnar. In: Arntzen JG, Eggen A, Eikeland IEM et al (eds) Norsk Biografisk Leksikon. Kunnskapsforlaget, Oslo, p 289

Helgadottir R (2006) The Influence of American Theories on Judicial Review in Nordic Constitutional Law. Martinus Nijhoff Publishers, Leiden/Boston

Holmås L (2006) Fra spesialdisipliner til allmennvitenskap: sosiologiske tilnærminger ved Instituttet for sammenlignende kulturforskning 1922–1940. Dissertation, University of Oslo

Knoph R (1927) Nydannelser i norsk kontraktsrett, skapt ved trust-lovgivningen. Norsk Retstidende 92:1025–1039

Knoph R (1934) Utviklingslinjer i moderne formuerett. JM Stenersens Forlag, Oslo

Knoph R (1939) Rettslige standarder. Grøndahl & Søn, Oslo

Michalsen D (2007) Dansk —Norsk rettsvitenskap etter 1814. In: Damm H, Dybdahl L, Taksøe-Jensen F (eds) Jura & Historie. Jurist- og Økonomiforbundets Forlag, København, p 103

Michalsen D (2011) Rett: en internasjonal historie. Pax Forlag, Oslo

Ross A (1957) Tû-tû. Harvard Law Review 70:812–825

Ross A (1959) On Law and Justice. University of California Press, Los Angeles

Sandmo E (2005) Siste ord: Høyesterett i norsk historie 1814–1965: bind II 1905–1965. Cappelen, Oslo
Scheel H (1907) Om Rettens Grund som Udgangspunkt for Læren om Retskilderne. Tidsskrift for Rettsvitenskap 20:249–262
Scheel H (1912) Forelæsninger over norsk tingsret. Brøgger TO, Kristiania
Scheel H (1940) Rettskildene i norsk og dansk rettslitteratur. Tidsskrift for Rettsvitenskap 53:119–144
Slagstad R (2011) Rettens Ironi: studier i juss og politikk: ny utvidet utgave. Pax Forlag, Oslo
Stang F (1935) Innledning til formueretten. Aschehoug, Oslo
Stone J (1965) Human Law and Human Justice. Stevens & Sons Limited, London

Legislative Materials

NUT 1960: 1 Rådsegn 5 Om særlege råderettar over framand eigedom [Norwegian government report series]

Cases

Norwegian Supreme Court
Norsk Retstidende [Rt.] 1918 p. 403
Norsk Retstidende [Rt.] 1976 p. 1
Norsk Retstidende [Rt.] 2007 p. 1281
Norsk Retstidende [Rt.] 2011 p. 780
Norsk Retstidende [Rt.] 2015 p. 1157
European Court of Human Rights
Applications nos. 13221/08 and 2139/10, Lindheim and others v. Norway. Decision, 12 June 2012