A GENERAL INTRODUCTION TO NORWEGIAN PROPERTY LAW
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Why write a thesis about Norwegian property law? Norway is a long and sparsely inhabited country perched between Sweden and the Norwegian Sea. Part of it stretches out beyond the Arctic Circle. Not only its geography but also its language presents an obstacle to Western Europeans interested in Nordic legal systems.

From October 2003 until August 2005 I lived in Bergen, on Norway’s West Coast. During that time I never had the chance to get acquainted with the Norwegian legal system. Upon returning to the continent and resuming my studies at Maastricht University I participated in Professor J.H.M. van Erp’s *European Property Law* class. Learning that little was known about Scandinavian law in general I decided to make an attempt to lift a tip of the shroud and unveil part of it to continental jurists.

Before beginning I would like to make a note regarding the accessibility of sources. Original sources are few in this part of the world and spread over libraries in the Netherlands and Belgium. Often, the books that can be found date from a while back. Thus the reader will notice that Thor Falkanger’s *Tingsrett* is a book often referred to.¹ This is simply so because it is one of the few recent and relevant books I could find regarding this particular subject.

Chapter 1 attempts to situate the Nordic legal family, which includes Norwegian law, amongst the legal systems of the world. In particular, what is the relationship between Nordic law and the two major western legal traditions: Civil Law and Common Law?

Chapter 2 deals with some fundamental concepts in Norwegian property law, it speaks of the right of ownership and provides an overview of limited real rights that appear frequently in Norwegian law.

Chapter 3 provides a more detailed examination of those limited real rights mentioned in Chapter 2.

And finally some remarks will be made regarding Norwegian property law in general.

Chapter 1: Nordic Law

Norwegian law is one of the Nordic legal systems. There has always been a close relationship between the different Nordic countries (Norway, Sweden, Denmark, Finland and Iceland). Denmark, Norway and Sweden were all part of the Union of Kalmar, which lasted from 1397 until 1523. Norway was united with Denmark, and under Danish rule, from the end of the 14th century until 1814. As from 1814 up until 1905 Norway was part of yet another union, this time with Sweden. Although the different Scandinavian countries each have their own, specific legal traits there have always been close ties between them on a linguistic, historic and cultural level.

So what is the position occupied by the Nordic countries within the different legal families? Several authors have different opinions. Arminjon, Nolde and Wolff classify the Nordic countries as a completely separate legal family alongside the French, German, English, Russian, Islamic and Hindu systems. Zweigert and Kötz claim that it is a separate group within the Civil Law system that includes French and German law. René David has yet a different point of view. He believes that Nordic law is part of the Civil Law, without giving it the separate position admitted by Zweigert & Kötz.

Today, the most common opinion, also shared by Nordic lawyers, is to see the Nordic legal systems as a separate legal family, distinct from both Civil Law and Common Law. The legal thinking of the Nordic countries is closer to continental Europe then to English or American Law. Yet, even though there has been a considerable influence from continental legal ideas, they form a category of their own. Ditlev Tamm points at different specific characteristics, though they are not always easy to discern:

1. use of tradition.
2. legal formalities are not that important.
3. lack of modern codes: an atmosphere of concrete/practical thinking as opposed to the abstract/systemic way of thinking in continental European countries.

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3 Arminjon, Nolde & Wolff, Traité de Droit Comparé, 1950.
4. local legal traditions survive to this day.⁷

The Nordic legal concepts evolved from medieval provincial laws that originated in the 13th century. Roman law and canon law were known and they had influence. However, Roman law was never seen as a *ius commune*⁸ in the North.

For example, in Sweden, the position of Roman law was somewhat stronger than in Denmark. The Swedish courts had to apply Roman law if there was no Swedish legal rule available. On the other hand, the noblemen that composed the Danish courts were well educated, but there was no “noblesse de robe”. They had not had a legal education. Thus they opposed the introduction of what they saw as foreign legal concepts.

In 1683, while Norway was still under Danish rule, Christian V promulgated his Danish Code. Basically the same codification was used in Norway, by way of the Norwegian Code of 1687. Roman law did not play an important part in these codes. They opted for a casuistic approach: instead of resorting to abstract principles the rules were most often formulated as examples. In the 17th century the influence that Roman law did have was most often indirect, through the studying of textbooks of German “Usus Modernus Pandectarum” by Nordic scholars.⁹

An important characteristic of Nordic law is that, up until today, they have not succeeded in substituting the old Codes with comprehensive modern ones. Even so, statutes are the primary means of introducing some order into the legal material. Since 1872 the Nordic countries have cooperated in an attempt to unify their laws. There has been cooperation in the fields of negotiable instruments, maritime law, trade marks, commercial registers, firms and the law of cheques, contracts law, family law etc. In spite of these unification efforts, there has been no Nordic cooperation in the field of land law and property

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⁸ *Ius Commune*: Roman Law was rediscovered and studied at universities in Northern Italy during the Middle Ages, more or less as from the second half of the 11th century. These legal principles eventually became known and were applied all over the European continent. Especially in the field of civil law (as opposed to public law) Roman law exercised a lot of influence. This *reuptake* of Roman Law took place at different times and to a different degree in the various regions of Europe. By the 16th century, Roman Law was applied throughout Europe (but not England). But not in its original form. Over time, it had been woven into the local legal traditions and had been mixed with other legal thoughts and concepts. This rediscovered and modified Roman Law is referred to as *Ius Commune*, because it was common to the different regions of Europe. It was used up until the introduction of the comprehensive codifications of the 18th and 19th century. (source: [http://www.jura.uni-sb.de/Rechtsgeschichte/Ius.Romanum/RoemRFAQ.html](http://www.jura.uni-sb.de/Rechtsgeschichte/Ius.Romanum/RoemRFAQ.html), last checked: 27-06-2006)
Chapter 2: Norwegian property law: an overview

§ 1. Introduction

Property law (tingsrett) is a part of patrimonial law (formueretten)\textsuperscript{11} together with the law of obligations (obligasjonsretten)\textsuperscript{12}, damages (erstatningsretten)\textsuperscript{13} and securities (panteretten).\textsuperscript{14} In Norway, panteretten, the law of securities, encompasses both mortgages and pledges.\textsuperscript{15}

The law of obligations (obligasjonsretten) deals with the relationship between a creditor and a debtor. It regulates the relationship between A and B. The debtor has to either do something (e.g. deliver a specific good, provide a certain service) or abstain from doing something (e.g. not to compete with A). Often, A also has to do something in return.\textsuperscript{16}

Whereas the law of obligations deals with the relationship between A and another party, the law of property deals with A’s power over an object towards the rest of the world. If A’s right is protected against everybody, we are dealing with a real right. If his right is protected only against his debtor, then we speak of a personal right.\textsuperscript{17}

The law of property deals with material objects. This includes both mobile and immobile goods. Claims are also included.\textsuperscript{18} The law of securities deals with the same substance as the law of property, yet in Norway it has always been treated as a discipline of its own.\textsuperscript{19}

\textsuperscript{13} R.J.B. Anderson, p. 93 and also pp. 45 and 82-83 for some clarifications regarding damages and tort. See also Åge Lind, \textit{Engelsk – Norsk Juridisk Ordbok, Sivil- og Straffret}, p. 71 (Cappelen Akademisk Forlag, 2. opplag 2001).
\textsuperscript{14} Falkanger, p. 28.
\textsuperscript{15} R.J.B. Anderson, p. 101.
\textsuperscript{16} Falkanger, p. 28.
\textsuperscript{17} Falkanger, pp. 28-29.
\textsuperscript{18} Falkanger, p. 29.
\textsuperscript{19} Falkanger, p. 30: “Endelig nevnes at selv om panteretten faller innenom ‘rettsforholdene vedrørende de materielle ting’, er det hos oss lang tradisjon for å handle panteretten som en egen disiplin, sidestilt med tingsretten.” For more references, see Falkanger, p. 30, footnote 5.
§ 2. Static vs. dynamic property law

Recently, a distinction between static and dynamic property law has been introduced in Norwegian law. The static law of property deals with rights that have been established, rights that are “on hold” one might say. The static law of property deals with the content of the right of ownership and limited real rights. The dynamic law of property, on the other hand, deals with how these rights are created, how they are extinguished and how they are transferred from one person to the next.

This can be clarified with an example regarding the law of servitudes. The static law of property deals with what rights the beneficiary of a servitude can claim towards the owner of the land, and what rights the owner of the property that must bear the servitude can claim towards the beneficiary. The dynamic law of property focuses on how the servitude is created and extinguished, and how it is transferred to a third party by way of agreement, inheritance, prescription, etc.

Thus the dynamic law of property deals with the creation, transfer and extinction of a right. In particular, it concerns third-party problems. For example, A sells an object to B, but the buyer (B) does not pick it up right away. Before the delivery of the object takes place, A sells it a second time, to C. What will then be the relationship between B and C? Or A creates a right of pledge in favour of B. This right of pledge will possibly have repercussions on third parties that have dealings with either A or B. For example, in case A’s creditors seek to seize it. The right of pledge, as it exists between A and B, can be dealt with under the static law of property. However, as soon as third parties become involved, it will be looked at from the angle of the dynamic law of property.

So the dynamic law of property deals with how B (who derives a certain right from A) is protected against A’s predecessors, A’s creditors and others that derive a right from A.

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20 Falkanger, p. 33.
21 Falkanger, p. 33: “… statisk tingsrett [er] definert som ‘innholdet og omfanget av eiendomsretten og de begrensende rettighetler til tingene’, mens sporsmål om hvorledes disse rettighetler stifles, hvordan de opphører og på hvilken måte de går over fra den ene person til den annen, henregnes til den dynamiske tingsrett.”
22 Falkanger, pp. 33-34.
23 Falkanger, p. 35.
24 Falkanger, p. 35.
25 Falkanger, p. 35.
§ 3. The Substantial and the Functional Concept of Ownership

When a good is being transferred from A to B, who does it belong to then? Who is responsible in case the good gets damaged? Can A’s creditors claim the good? Who must bear costs made to preserve the good?

One way of dealing with these problems is by qualifying the right of ownership as something that is either with A or B. This is the substantial concept of ownership (det substantielle eiendomsrettsbegrep). Here, ownership is transferred from A to B at a particular point in time, there is an en bloc-transition.

Another, more pragmatic approach is to perceive the right of ownership as a totality of rights, this is the functional concept of ownership (det funksjonelle eiendomsrettsbegrep). When an owner transfers the totality of his prerogatives on a good to another person, we speak of a transfer of ownership. On the other hand, when only a certain number of his prerogatives are transferred, we are dealing with the creation of a limited real right. It then becomes burdensome and unpractical to look at ownership as something which is either with A or with B. Norwegian law considers it easier to look at each individual prerogative.

For example, A sells a good to B. Publicity requirements will determine whether or not A’s creditors are entitled to claim and publicly sell the good. The determining factor will then be whether the good has been delivered to B (in case of mobile goods) or whether it has been duly registered (in case of immobile goods). Other example: when A has sold to B, he cannot sell the good a second time to C. And if C is informed of the deal between A and B he should not seek to obtain the good from A. Here it is irrelevant whether B is in possession of the good (mobile goods) or has registered it (immobile goods).

Therefore, Norwegian law speaks of the gradual transition of the right of ownership. The position of the buyer gradually becomes stronger as time passes by. Example: by way of the sales agreement, B has some safeguards against A selling the good a second time to C.

26 Falkanger, pp. 62-65.
27 Falkanger, p. 63: “… å betrakte eiendomsretten som noe som samlet går over fra A til B ved et gitt tidspunkt (en bloc-overgang).”
28 Falkanger, p. 63: “Eiendomsretten må sees som en sum av beføjelser (funksjoner), slik som antydet ovenfor: rett til ulike former for faktisk og rettslig rådighet – med mulighet til å hindre andre i en tilsvarende rådighet.”
29 Falkanger, p. 63: “ Ved total overføring taler vi om eiendomsovergang.”
30 Falkanger, p. 63: “Gjelder det deler av rådigheten, stiftes det en begrenset rettighet (jfr. # 2.43 ovenfor).”
31 Falkanger, p. 64: “Dette er bakgrunnen for at det tales om eiendomsrettens sukssessive overgang.”
This protection will become definitive once B is in possession of the good (mobile goods) or when it is duly registered (immobile goods).

Even so, some transactions in everyday life are so simple (e.g. buying a newspaper) that we can speak of a substantial transfer at one point in time.\textsuperscript{32} It is also worth bearing in mind that some Norwegian legal rules do seem to focus on the substantial aspect. In some situations it is not very interesting to think of who may have a right that could become important under certain circumstances; it is more important to establish who is in control and who bears the economic risk.\textsuperscript{33} For example, creditors are allowed to claim any good that belongs to, is owned by, the debtor. Then the question becomes whether the link between the debtor and the object in question is so strong that we can speak of ownership.\textsuperscript{34}

\section*{§ 4. The Right of Ownership & Limited Real Rights\textsuperscript{35}}

\section*{§ 4.1 The Right of Ownership}

An owner has the usus, fructus and abusus\textsuperscript{36}, both factually and legally. In theory, the right of the owner is complete and absolute. In practice, there are many restrictions and regulations that limit that absolute right.\textsuperscript{37} This leads to a negative definition of the right of ownership: it includes everything that is not explicitly forbidden.\textsuperscript{38} As a consequence, the right of ownership can be seen as flexible or elastic. The right of an owner can be restricted, but when these restrictions disappear the right of ownership becomes whole again, it regains in strength.\textsuperscript{39} It can be compared to a sphere that shrinks when, for example, a right of servitude is created. Once the servitude is extinguished, the right of the owner is whole again (the sphere regains the size it had before).\textsuperscript{40}

\vspace{1cm}

\textsuperscript{32} Falkanger, p. 64: “Iblant er transaksjonen så enkel at det kan sies at eiendomsretten går over en bloc (alle funksjoner går over samtidig).”

\textsuperscript{33} Falkanger, p. 64.

\textsuperscript{34} Falkanger, p. 65.

\textsuperscript{35} Falkanger, p. 37.

\textsuperscript{36} The terms usus, fructus and abusus seem to carry the same meaning in Norway as in, for example, Belgium.

\textsuperscript{37} Falkanger, p. 39: “Utgangspunktet – som blir at eieren har den totale og eksklusive rådighet – er underkastet en rekke modifikasjoner.”

\textsuperscript{38} Falkanger, p. 39: “Dette er i korthet bakgrunnen for den vanlige, negativt utformede definisjon av eiendomsretten: Den gir alle de beføyelser som ikke særskilt er untatt.”

\textsuperscript{39} Falkanger, p. 39: “… [E]iendomsretten er fleksibel (elastisk). Eierens rådighet kan bli beskåret, men når begrensninger faller bort, utvider eierens rådighetsfelt seg igjen.”

\textsuperscript{40} This metaphor was used by B. Akkermans, LLM during a \textit{European Property Law} lecture. This class was taught by Professor J.H.M. van Erp and B. Akkermans (LLM) at Maastricht University in November-December 2005.
Another issue is who shall be considered to be the owner. Mobile goods often have only one owner. Immovables, on the other hand, are frequently owned by two or more persons. Who will then be considered to be the owner?41

When A and B have the same powers of disposition over a piece of land the situation is simple. They must be considered to be in a situation of co-ownership. This does not prevent them from making an agreement between them regarding the use of the land. For example, A can use the land to exploit a mine situated there and B can use it for letting his sheep graze and to take wood from the forest.

But what if A and B have different rights of exploitation on a permanent basis? For example, when A has the right to let animals graze and B the right to take wood from the forest. Who is then to be considered the owner? Does one of them enjoy a right of ownership and does the other have a restricted real right, do both parties have the right of ownership or is there a third party that enjoys the right of ownership? Now these three possibilities will be considered in turn.

Firstly, if we consider a third party to have the right of ownership, then A and B are only entitled to a limited real right.42 Here, C will be the owner. If A or B’s right of exploitation is limited or when it disappears, C’s right will expand accordingly.43 Also, if new ways of exploiting the property are discovered (e.g. a mineral that was not believed to have any useful industrial application in the 19th century turns out to be very important for a specific industry today) they will be there for C to exploit, since he is entitled to the right of ownership.44

Secondly, if we give both A and B a right of ownership, then both are owners with regard to the specific use or exploitation, and in this case there are no other owners. Said in a different way: there is no C here. A is the owner regarding the grazelands, B is the owner regarding the forest. This is a divided right of ownership or a relative right of ownership; kloyvd eigedomsrett46 in Norwegian. If this point of view is followed, both A and B will have the right to exploit the mineral, as opposed to the previous example, where it was the

41 Falkanger, p. 42.
42 Falkanger, p. 42: “… A og B oppfattes som rettighetshavere, dvs. Slik at en del av den totale eierrådighet er overført til dem.”
43 Ibid.
44 Ibid.
45 In Norwegian: relativ eiendomsrett.
46 The relative right of ownership was defended by the Norwegian scholar K. Robberstad.
prerogative of the one and only owner, C. The Norwegian scholar Robberstad has made an argument for the relative right of ownership (or kløyvd eigedomsrett) as being in tune with the way things were in old Norwegian law. And indeed, until a couple of hundred years ago, few people had a formal right of ownership to land. Before, people had a right to let animals graze, a right to take wood to build, a right to fish and hunt etc. This survives to this day in the collective right to pluck berries and mushrooms, to fish in the sea, to hike on uncultivated land, to set up camp etc.

The third possibility pitches Scheel against Robberstad. Even the latter in the 1960s recognized that, in modern Norwegian legal theory, there is only one who enjoys the right of ownership, unless in a situation of co-ownership, and the others are beneficiaries of a limited real right. This is Roman Law as expressed in Justinian’s Corpus Iuris Civilis, and in Norway it was propagated in the 1910s by the scholar Scheel. The courts have followed Scheel’s point of view: there can be only one owner.

Let us turn to France now, a country believed to have had a unitary system of ownership since the promulgation of the Code Napoléon. Yet the Caquelard contre Lemoine decision shows that this may not be the case. This decision illustrates that Norway is not the only country where the unitary concept of ownership was under fire. Even after the entry into force of one of the most famous codifications of them all, the Code Civil of 1804, a fundamental idea that underpins the Civil Law system was questioned in France itself.

At the heart of the system of real rights in Civil Law lies the concept of unitary ownership. This is the idea that ownership cannot be fragmented. Co-ownership is not incompatible with the concept of unitary ownership, because co-owners share full ownership rights. Regarding rights in rem, which can be enforced against the world, there exists a numeros clausus. The numeros clausus enumerates which rights in rem exist, what their content is, and provides for explicit provisions as to their creation, transfer and extinction. This is a closed and mandatory system, and French law adheres to it since the promulgation of the Code of 1804. Or does it?

48 In Norwegian: allemannsretten. See infra.
49 Herman Scheel, Forelæsninger i Norsk Tingsrett, (Christiania, 1912).
50 Falkanger, p. 43: “Retspraksis er klar. Domstolene har fulgt Scheel: Det er en som oppfattes som eier – med negativt avgrenset beføjelser, mens den eller de øvrige betraktes som rettighetshavere med positivt avgrenset rådighet.”
51 Code Civil, promulgated March 21, 1804.
53 As opposed to rights in personam, which can only be enforced against a debtor.
In the *Caquelard c. Lemoine* decision, the French *Cour de Cassation* had to pronounce itself on a question of co-ownership under the Civil Code of 1804 which conflicted with an old Normand custom. The lower courts admitted that both Caquelard and Lemoine enjoyed a right of co-ownership on a particular piece of land. In spite of this right of co-ownership one of them was believed to be exclusively entitled to the herbs (Caquelard), the other one exclusively to the trees (Lemoine) on that piece of land. Caquelard was not satisfied with this decision, since the value of the trees was far greater than that of the herbs, and thus the case ended up before the *Cour de Cassation*. He claimed that there was a violation of Artt. 544, 546 and 552 of the Civil Code of 1804. These articles established an absolute right for him, Caquelard, on 50 % of everything. This meant that each of them owned 50 % of both the herbs and the trees. Thus, he argued, the lower courts had violated the aforementioned dispositions of the Civil Code of 1804 by attributing Lemoine alone with the ownership of the trees.

Surprisingly, the *Cour de Cassation* rejected Caquelard’s point of view. This was quite strange given the fact that it was believed that the drafters of the new Civil Code wanted to do away for good with the old feudal traditions which accorded a right of ownership to different people. Under the new Code, there was only one owner, and if there was a situation of co-ownership, then each co-owner was to have just as many rights as the other one(s).

So the issue at stake in this decision was whether rights *in rem* were limited to those enumerated in the Civil Code, or infinite, like rights *in personam*? In other words: was it possible to create real rights apart from those explicitly mentioned by the Civil Code? The answer of the *Cour the Cassation* was: yes. The promulgation of the new Code had *not* abolished the old Normand customs. Thus it was perfectly possible that Caquelard and Lemoine had a right of co-ownership *and* that Lemoine had an exclusive right to the trees and Caquelard an exclusive right to the herbs. This decision, which still stands, casts doubt over the alleged existence of a numerus clausus in French property law.

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54 See *supra*.
55 “Attendu, en droit, que les articles 544, 546 et 552 c. civ., sont déclaratifs du droit commun relativement à la nature et aux effets de la propriété, mais ne sont pas prohibitifs ; - Que ni ces articles, ni aucune autre loi, n’excluent les diverses modifications et décompositions dont le droit ordinaire de propriété est susceptible ; - Rejette … ” - *Caquelard c. Lemoine*. 
§ 4.2 Limited Real Rights

In Norwegian law, there is no numerus clausus, so there is no limited number of real rights that can affect property. Yet in everyday life there are certain types that appear frequently. Rights of usage are an important group. In this group, total rights of usage must be distinguished from partial rights of usage. A total right of usage implies that the beneficiary of the right has possession of the good. On the other hand, a partial right of usage means that the beneficiary does not have possession of the good to which the right is connected.

Two important total rights of usage are the lease of plots of undeveloped land (feste, or leie, av grunnarealer) and the lease of developed land (husleie).

Partial rights of usage are positive servitudes (positive servitutter) and negative servitudes (negative servitutter). An example of the first is a right of way over another person’s land. An example of the second is the interdiction to engage in commercial activities from a certain house or plot of land. Negative servitudes limit the factual use of a good, not the legal use. Legal interdictions (rettslige forbud) can restrict the legal use of a good. For example, when plots of land are sold it may be stipulated that these plots may not be divided. This is different from the continent, for example in the Netherlands, where one would have to resort to the technique of kwalitatieve rechten and a schakelbeding in order to achieve the same result.

Whereas servitudes stipulate that the owner must tolerate that others make use of his land (passive), grunnbyrder state that the owner of the good must do something for someone else (active). For example, maintaining a road or a ditch or the duty to deliver two litres of

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56 Falkanger, p. 58.
57 Falkanger, p. 58: “Hos oss er det ikke slik at det er et begrenset antall rettigheter som kan hvile på (påheftes) fast eiendom. I praksis er det imidlertid visse typer som forekommer (...)”
58 Falkanger, p. 58: “En rettighet er total når rettighetshaveren har besittelsen av tingen.”
59 Falkanger, p. 59: “Hvor bruksrettshaveren ikke har besittelsen av den eiendom som rettigheten knytter seg til, står man ovenfor en partiell bruksrett (…)”
60 Falkanger, p. 58-59.
61 Falkanger, p. 59.
62 Falkanger, p. 61: “Negative servitutter legger bånd på den faktiske rådighet, ikke den juridiske.”
63 Falkanger, p. 61.
64 Falkanger, p. 59-60.
milk every day, half a pig for Christmas etc.\textsuperscript{65} \textit{Grunnbyrder} must be complied with by whoever owns the land at any one point in time. In Norway, this too is regulated through the law of property.

\textit{Løsningsrettigheter} are about the beneficiary having a right to become owner. There is the \textit{førkjøpsrett} and the \textit{kjøperett}. A \textit{førkjøpsrett} can be exercised when a property is being sold. The beneficiary of this right can replace the buyer. He becomes the buyer and can exercise the buyer’s rights and obligations. A \textit{kjøperett} is characterised by the fact that the beneficiary of this right can take over the property without there being a sale to a third party, as is the case with the \textit{førkjøpsrett}. For example, the right to buy more land “if the need arises”.\textsuperscript{66} Or the right to buy B’s property if it is neglected. A very important \textit{løsningsrett} is the \textit{odelsrett}, which is a right in law that exists only in Norway.\textsuperscript{67} Historically, the \textit{odelsrett} was seen as a protection against encroachments by the state and a way to ensure farmers’ right to land.

The \textit{odelsrett} is a right enjoyed by the direct descendants of a person to buy back the rural property if it is sold to someone outside the family. Said differently, if it is sold to someone who has no \textit{odelsrett} whatsoever regarding a certain property. It can also be exercised against someone inside the family if that person has a worse \textit{odelsrett}. Two conditions must be fulfilled for the \textit{odelsrett} to be exercised: first of all it only concerns rural properties. Meaning simply that it must be used for farming. Secondly, an owner (the \textit{odleren}) must have enjoyed a full right of ownership over the property for a period of twenty years. The beneficiaries of the \textit{odelsrett} have a timeframe of one year to exercise this right, counting from the moment the property passed to the new owner.

The oldest of the direct descendants is the first beneficiary and it is irrelevant whether that person is male or female. However, it must be noted that the oldest is not the only person to be able to exercise this right. Should the oldest decide not to make use of this right, then people with a lower ranking \textit{odelsrett} will also be able to act. The one-year time limit to initiate this action applies to all, regardless of their priority position. An agreement must be reached regarding the amount that the one who exercises the \textit{odelsrett} (called \textit{odelsøseren})

\begin{flushleft}
\textsuperscript{65} Falkanger, p. 60.
\textsuperscript{66} Falkanger, p. 61: “dersom det er behov for det.”
\textsuperscript{67} R.J.B. Anderson, p. 99: “No equivalent Eng. Swed. Dan. Comments: This is a right in law special to Norway. … ; the law of the Constitution (\textit{Grunnloven} of 17-05-1814) directs that it … shall never be abolished.”
\end{flushleft}
will pay in order to get the property back. Also, the *odelsløseren* has a duty to live on and work with the property for a period of at least ten years.\(^{68}\)

Then there is the right of mortgage/pledge, called *pant* in Norwegian.\(^{69}\) *Pant* covers both mortgages and pledges. Here, a good is used to secure the execution of an obligation. The creditor may sell the good if the debtor does not pay him back, through intervention of the public authorities, and hopefully he will be able to pay himself back on the sales price of the good.

Finally, there are certain collective rights (*kollektive rettigheter*).\(^{70}\) Collective rights can be broken down in two categories: *allemannsrettigheter*\(^{71}\) and rights enjoyed by *almenninger*.\(^{72}\) The latter category can be subdivided into *statsalmenninger* and *bygdealmenninger*.

The Norwegian community as a whole has, since time immemorial, had rights over other people’s land. For example, the right to swim and camp, the right to use a boat in lakes and next to shores subject to private property, the right to hike in the wild all year long, the right to hike on farmed land during the time of year when it is frozen etc.\(^{73}\) These rights are named *allemannsrettigheter*. These collective rights are significantly weaker then the other limited real rights.\(^{74}\) For example, if a piece of land is expropriated it is very rare for a beneficiary of a collective right to be entitled to receive compensation.

Sometimes, villages as a whole have rights over a specific piece of property. This is the case of so-called *statsalmenninger*: the state is entitled to the ownership of the land, but farmers of a village can exercise collective rights (e.g. right to let animals graze, or the right to take wood). But they are only allowed to satisfy their personal needs, they cannot take more than that. *Bygdealmenninger* are different in that respect that is it not the State who enjoys the right of ownership over the communal land, but the village itself. So the difference between these two types of *almenning* revolves around the question of entitlement to the right of ownership: the state or a village.

\(^{68}\) Source: Høyesterettsadvokat Thorstein Vale - “Innføring i odels- og åsetesretten” (http://www.jusstorget.no/article.asp?Key=1&FagKey=12), last checked: 28-06-2006.


\(^{71}\) Falkanger, § 43, p. 351.

\(^{72}\) Falkanger, § 44, p. 356.

\(^{73}\) Falkanger, p. 62.

\(^{74}\) Falkanger, p. 62: “Rettighetene, som gjerne sammenfattes med betegnelsen allemannsrettigheter, har et betydelig svakere vern enn de rettighetem som er nevnt ovenfor.”
So far we have dealt with some of the basic concepts of Norwegian property law and we have established that there exists no numerus clausus in Norwegian law. Subsequently, we have seen an overview of limited real rights and in the next Chapter we will proceed to a more detailed examination of those most frequent in Norwegian property law.

**Chapter 3: Limited Real Rights**

§ 1. Servitudes

A servitude can be defined as a limited real right giving some *factual* control over someone else’s property. The beneficiary of the servitude can actively use the affected property. For example, he can have a right of way. This is a positive servitude. Servitudes can also be negative, for example, a legal prohibition to engage in commerce from a certain property. Servitudes are regulated by the Servitude Law of 1968. This law only concerns servitudes on immobile properties.

The drafters did not include servitudes on mobile goods in this law, but admitted that the rules established in the Servitude Law could also be used for mobile goods by analogy. For example, if A provides B with a loan so that he can buy a truck, A can stipulate that the truck will not be used for the transport of certain specified goods. Or if A provides B with money so that B can buy a boat, A can stipulate that his goods will be transported free of charge by B. These examples were given by the *Sivillovbokutvalet* when they drafted the Servitude Law of 1968. However, with regard to the example concerning the boat they admit that it is closer to a *grunnbyrde* then a servitude. Servitudes on mobile goods may also exist in connection with servitudes on immobile goods. If A obtains a servitude to fish in a

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76 Falkanger, p. 155: “En servitutt kan rent foreløpig forklares som en begrenset rett til faktisk rådighet over fremmed eiendom.”
77 In Norwegian: *Servitutloven av 1968 (lov um særlege råderettar over framand eigedom).*
78 Inst. O. XII (1967-68), p. 6: “[det er] grunn til å tru at so langt reglane hover, kjem dei til å verta nytta på rettar over lausøyre med”.
79 Falkanger, p. 156.
80 Falkanger, p. 156 - Rådsegn 5, pp. 7 and 34: “Som eksempler på servitutter i løsøre nevner Sivillovbokutvalet at den som låner A penger til innkjøp av lastebil, betinger seg at bilen ikke skal brukes til transport av nærmere spesifiserte vareslag, eller at en handelsmann som yter A lån til innkjøp av en båt, forbeholder seg gratis transport av sine varer.”
81 See p. 13.
lake, he will also be entitled to use the boat belonging to the owner of the land on which the lake is situated.\textsuperscript{82}

A servitude is a specific right, meaning that it is for the benefit of a specific person. This distinguishes servitudes from collective rights (e.g. the right to camp or to pluck berries and wild mushrooms).\textsuperscript{83} A collective right is not specific, because it can be used by anyone (in case of an \textit{allemannsrett} or by a certain village (an \textit{almenning}).\textsuperscript{84}

There are no limits regarding what kind of servitudes may be imposed upon a property. But there are certain types of servitudes that are very common. Depending on what criteria are used, it is possible to distinguish between: servitudes of appropriation\textsuperscript{85} (e.g. the right to fish, hunt, or gather wood), servitudes of usage\textsuperscript{86}: here, a distinction is made between a right of way\textsuperscript{87} and the right to set up constructions on the other property, for example, sewage pipes or power lines and, finally, servitudes that give a right to extended use of one’s own property. For example, the right to engage in an activity that would normally be forbidden because it exposes the neighbour to excessive noise or dust.\textsuperscript{88}

The most important distinction is the one between \textit{personal} and \textit{real} servitudes. In order to use the term ‘servitude’, the rights and obligations that exist between A and B must be connected to a property. Anyone (C) who would obtain the property later on would benefit from that servitude. If not, it would simply be a contractual obligation between A and B. All the servitudes that are to the advantage of the person who at any given point in time is in control of the dominant property are to be classified as \textit{real servitudes}.\textsuperscript{89} For example, sewage pipes running through the soil of the other property. All other servitudes are \textit{personal servitudes}.\textsuperscript{90} Personal servitudes are linked to a person, not a property. For example, the right

\textsuperscript{82} Falkanger, p. 156 - Rådsegn 5, pp. 7 and 34: “Servituttrådighet over løsøre kan også tenkes i tilknytning til rettighet over fast eiendom: Ved erverv av fiskerett i et vann får mann også rett til å bruke grunneierens båt.”

\textsuperscript{83} Falkanger, p. 157.

\textsuperscript{84} See supra and infra.

\textsuperscript{85} Falkanger, p. 159. In Norwegian: \textit{avvirknings- eller tilegnelsesservitutter}.

\textsuperscript{86} Falkanger, p. 159. In Norwegian: \textit{egentlige bruksservitutter}.

\textsuperscript{87} In Norwegian: \textit{ferdselsrettighet}.

\textsuperscript{88} Falkanger, p. 157: “En servitutt kan også gi rett til utvidet rådighet over egen grunn, dvs. til å utnytte egen eiendom på en måte (eller oppretholde en tilstand der) som ellers ville være ulovlig – f.eks. drive en særlig stoyende og generende virksomhet, jfr. nabol. § 2, eller ha vindusåpning nærmere grenselinjen enn tillatt efter nabol. § 4 annet ledd. Slike tilfelle fanges opp av ordene ‘anna utnyttingsrådvelde’.”

\textsuperscript{89} Falkanger, p. 160: “... servituten [skal] normalt følge med når A selger eiendommen; servituten vil tilkomme den som til enhver tid er eier av eiendommen. Vi taler isåfall om en \textit{reell} servitutt (eller en realservitutt).”

\textsuperscript{90} Falkanger, p. 160: “De servitutter som ikker er reelle, er \textit{personlige}.”
A has to fish in a lake. This can be a personal right of servitude, even though A may have a cabin by the lake. The right of fishing was traditionally seen as a real servitude, but it can also be agreed upon that this right is created as a personal servitude. The will of the parties prevails, and therefore it must be examined on a case-by-case basis whether a servitude was intended to be a real or a personal one.

Typically, real servitudes are lasting. The duration of a servitude must be determined by interpreting the situation when the servitude was created. This too is done by adopting a case-by-case approach. Most conflicts regarding duration arise regarding the question whether a servitude is created forever or for as long as a certain person lives.

In principle, both real and personal servitudes may be transferred. This does not prevent the law from imposing certain limitations. Other limitations may be linked to circumstances specific to the parties. For example, if someone lets a handicapped person take a shortcut over his property, as is necessary because of the handicap, it is clear that this is a personal servitude that may not be transferred because it is a strictly personal right incumbent on the handicapped person.

§ 2. The Ground Lease

A ground lease is a long lasting, total right of usage over a piece of land, which gives the festeren the right to have buildings or other constructions on the land, in return for payment, usually in the form of an amount of money, payable per annum. The applicable law here is the Ground Lease Law of 1975.

The law, in its paragraph 1, declares itself applicable to agreements regarding “lease of land for a house which the festeren has or will have on that land.” Most often the bortfesteren provides a piece of land where the festeren himself will build a house (will have). Another option is that the bortfesteren sells his house to the festeren (has).

91 Falkanger, p. 172: “Det tradisjonelle element kan også bli tillagt vekt, slik at rettigheter som fra gammelt av har vært betraktet som naturlig ‘tilbehør’ til et gårdsbruk (jakt, fiske), kan bli ansett som reelle servitutter, selv om de stiftes idag hvor situasjonen kan være en noe annen i så måte.”
92 Falkanger, p. 169: “Hvorvidt det ene eller det annet er tilfellet, og eventuelt hvilken tidsbegrensnings som gjelder, må avgjøres ved en tolkning av stiftelsesgrunnlaget.”
93 Falkanger, p. 169: “Det problemet som hyppigst har meldt seg, er hvorvidt servituten er for bestandig eller for en bestemt persons levetid.”
94 In Norwegian: tomtefeste.
95 In Norwegian: tomtefesteloven av 1975.
96 Falkanger, p. 205: “leige av grunn til hus som festaren (leigaren) har eller får på tomta.”
97 Falkanger, p. 205-206.
Paragraph 6 of the law provides that the duration of the *tomtefesten*, called *festetiden*, will be 80 years. Nonetheless, the parties may agree upon any other duration they want: one exceeding 80 years or even one without a timelimit (*feste utan tidsavgrensning*). However, if they agree upon a duration of less than 80 years, the *festeren* will have the right to demand a renewal of the contract up to the point where he will have completed at least 80 years of *feste*. The *festeren* has the right to purchase the land. He may exercise this right after 30 years have passed or at the end of the *tomtefeste*. However, in its paragraph 34 the law provides that this right may only be used to the extent that it is compatible with the right which the *bortfesteren* has. The sum that needs to be paid by the *festeren* in this case (the *innløysingssummen*) is 30 times the rent per annum.

Paragraphs 16-19 of the law describe what the *festeren* is allowed to do. So if the ground lease was created for the construction of a house, the *festeren* may go quite far. He may dig a basement, construct a road etc. This is important, because in paragraphs 39-41 the law provides what must be done when the ground lease comes to an end. Then the *festeren* has the right and the duty to take away everything he has built and to return the site to its original state. However, if this would lead to unnecessary destruction of values, both the *bortfesteren* and the *festeren* can demand that the constructions are to be taken over by the *bortfesteren* against payment of a sum of money.

According to Lid, it is not easy to draw the line between a *festerett* and a right of ownership. If the right thus created is defined positively then the residual right will belong to the owner. The right of property in Norway is negatively defined, meaning that the owner can do everything he wants with the property concerned, apart from the limitations imposed upon

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98 Falkanger, p. 208: “Hovedregelen etter § 6 er at festetiden skal være 80 år, hvilket må bety 80 år fra tomten ble stillet til festerens disposisjon.”
99 Falkanger, p. 208.
100 *Tomtefesteloven*, Kapittel 6 – Innløysing og lenging. See also Falkanger, p. 207: “... gir festeren rett til å innløysje festet (’frikjøpe tomten’).”
101 *Tomtefesteloven*, § 32.
102 *Tomtefesteloven*, § 34: “Retten til innløysing gjeld berre så langt denne kan sameinast med bortfestarens rettsgrunnlag etter lov eller avtale.”
103 *Tomtefesteloven*, § 37.
104 *Tomtefesteloven*, § 39: “Når eit tomtefeste skal avviklast, har festaren rett og plikt til å ta bort hus og andre faste tilskipingar som festaren har på tomta.”
105 *Tomtefesteloven*, § 40: “Dersom borttaking etter § 39 vil føre til at verdier går til spille i utrengsmål, kan både festaren og bortfestaren få rett til å kreve at bortfestaren tek over hus og faste tilskipingar mot vederlag.”
him by law or agreement.  According to Lid, a festerett can be so extensive that the festeren can be seen as the person who can do anything he likes with the property, as long as there are no limitations imposed by law or agreement. In such a situation, the bortfesteren is to be seen as a third party. If the bortfesteren wants to make a particular use of the land during the tomtefeste, he must be able to document this as being part of the agreement.

Sometimes the right of the festeren expands because, for example, a servitude which a third party was entitled to disappears. Then the right of the festeren grows.  So the elasticity, which is a characteristic of the right of ownership, also applies here. Therefore it cannot be a defining characteristic that clarifies who is entitled a right of ownership and who is entitled to a right of tomtefeste.

Every time one is confronted with a situation of tomtefeste it will be necessary to take all relevant factors into account. Relevant factors are, for example, the length of the tomtefeste or whether the money is paid every year or in one lump sum.

§ 3. Prescription

Prescription means that the person who has used an object for a certain period of time in good faith and who believes that he has a right consistent with the use he makes of the good, gets such a right. This can take place when A has no original right to justify the use he makes of the good. This is called independent prescription (selvstendig hevd). Prescription can also repair a defective right, for example when one has bought a good from a minor. This is called completing prescription (utfyllende hevd). The rules on prescription apply both to mobile and immobile goods. For immobile goods, a period of 20 years is required. For mobile goods, this is a period of 10 years.

107 Lid, p. 2: “Er denne retten etter sitt innhald positivt avgrensa, vil det logisk sett vera ein prinsipiell skilnad mellom ein slik rett og eigedomsretten – d.v.s. restretten som er at hjá eigaren. Dette at eigedomsretten i sitt innhald er negativt avgrensa, har gått att i dei definisjonar av eigedomsretten som som har vore gjevne i dei viktigare teoretiske framstellingar av tingsretten, som har vore vanleg bruuka på våre kantar i nyare tid.”

108 Lid, p. 3: “Dersom ein slik særrett for grunneigaren fell bort, er det festeretten som utvidar seg tilsvarande.”

109 Lid, p. 3: “Den elastisiteten som skulle vera eit særkjenne for eigedomsretten, vil såleis også festeretten ha, og dermed vil dette omstendet ikkje kunne brukast som avgjerande kjennerke.”

111 In Norwegian: hevd – the acquisition of a right by the passage of time (see R.J.B. Anderson, “Anglo-Scandinavian Law Dictionary”).

112 Falkanger, p. 224.

113 Falkanger, p. 225.

114 Hevdsloven, § 2.
First off it is necessary to take the time to look at rules that involve the extinction of a right through passivity. If A uses a thing for a certain period of time it may become clear that he had no legal basis for doing so.\textsuperscript{115} Maybe he bought it from a seller who did not own it and was not entitled to sell it. Or he believed that he had a more extensive right than he actually should have had. The basic idea is that the true owner (B) should have the right to intervene to prevent the unauthorized use of his good: A illegal use of the good should come to an end.\textsuperscript{116} But there are many exceptions. If, for example, A has bought and registered a plot of land in good faith, B’s right will be extinguished.

B’s passivity alone is, as a general rule, not enough to extinguish his right. If B does not protest in any way his right can be lost. However, when facing an opponent who is not in good faith, there is no reason to impose a duty to object upon B.\textsuperscript{117} It depends upon an evaluation of each individual case to conclude as to whether or not B’s right is lost.\textsuperscript{118} How much time has passed by is an element, also whether or not A was in good faith. Of critical importance is B’s behaviour. Did he object or not?

The case-by-case approach adopted by the rule of passivity and other rules such as the \textit{foreldelses- og preklusjonsreglene} do not cover every situation. If A was in good faith, if he has invested time and money in the good and if his attitude shows that he believed that his use of the good was justified, it seems unfair to take the good from him. Then again, B is still the actual beneficiary of a certain right, and it seems unfair to take that away from him. Still, A can be protected by the rules on prescription (\textit{hevdsreglene}) and possibly by the rules on use since time immemorial (\textit{reglene om alders tids bruk}).\textsuperscript{119} The rules on use since time immemorial are most often used when there is no specific person (or persons) who claim prescription, for example, when a right is claimed by a village or a community.

A first form is \textit{proprietal prescription} (\textit{eiendomshevd}).\textsuperscript{120} It is required that the person invoking this right is in \textit{possession} of the object.\textsuperscript{121} Usually there are no problems when

\begin{flushright}
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\textsuperscript{115} Falkanger, p. 221: “Når en person (A) har rådet over en ting, kanskje gjennom lang tid, kan det bli bragt for dagen at han egentlig ikke var berettiget til dette fordi retten tilkom en annen (B).”
\textsuperscript{116} Falkanger, p. 221: “Utgangspunktet er utvilsomt at den egentlig berettigede (B) må kunne gripe inn når han blir klar over forholdet: A’s ulovlige utnyttelse av tingen må opphøre,...”
\textsuperscript{117} Falkanger, p. 222: “Men er A i ond tro, er det ikke noen grunn til å pålegge B noen slik reklamasjonsplikt.”
\textsuperscript{118} Falkanger, p. 222: “Hvorvidt en rett skal betraktes som tapt ved passivitet, vil bero på et skjønn i det enkelte tilfelle.”
\textsuperscript{119} Falkanger, p. 256.
\textsuperscript{120} Falkanger, § 25.
\textsuperscript{121} Falkanger, p. 233: “En klassisk krav for hevd er \textit{besittelse} av den ting man skal hevde, gjennom hele hevdsperioden.”
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mobile goods are concerned, the situation may be more complicated in case of immobile goods.

Another requirement is \textit{exclusivity}.\textsuperscript{122} It is not enough that others stake no claim to a right of property. It is necessary that his right is made clear to the world by some sort of use of a certain intensity, depending on the circumstances.

A third requirement is \textit{continuity}.\textsuperscript{123} There must have been a continuous use of the good. Whether this is the case is judged on a case-by-case basis, by looking at the facts of the case at hand.

\textit{Good faith} is another important element. The person who makes use of the right of prescription must believe that his use of the good is justified.\textsuperscript{124} This does not mean that this assessment is entirely subjective. It seems to be so that the standard is that of the \textit{bonus pater familias}.\textsuperscript{125} It also depends on the circumstances, age, professional activity (a lawyer has to measure up to a higher standard) etc.\textsuperscript{126} The good faith requirement must be fulfilled throughout the whole period (10 or 20 years).\textsuperscript{127} If the person finds out during the period of prescription that someone else has a stronger right than he does, the good faith requirement is no longer fulfilled.

The use that the person makes of the good must also be conflicting with the right he actually has, in order for the right of prescription to apply.\textsuperscript{128} For example, when someone borrows a book, he cannot claim that proprietal prescription applies. If the use which he makes of the good is in perfect conformity with the right the proprietor has, then there can be no prescription.

A rather obvious requirement is that the real owner must not yet have taken A to court within the time frame for prescription. Even if the real owner does not succeed in a court of law, A’s good faith will disappear if taken to court.\textsuperscript{129}

\begin{footnotes}
\item[122] Falkanger, p. 235: “For eiendomshevd er det et vilkår at hevderen har \textit{eksclusiv} rådighet.”
\item[123] Falkanger, p. 236: “... loven stiller også et krav om at eierpretensjonen må være kommet til uttrykk gjennom hele hevdsperioden – man må ha hatt tingen ‘som sin eigen ... i samanheng’ i hevdsperioden (§ 2).”
\item[124] Falkanger, p. 239: “Hevd er betinget av god tro, dvs. at hevderen må ha trodd at hans utnyttelse av tingen har vært berettiget. Den som vet at han ‘ikkje eig tingen, hevdar ikkje’.”
\item[125] Falkanger, p. 239: “Men av forarbeidene fremgår det at hevd ikke kan skje hvor en alminnelig fornuftig person ville ha forstått at noe var galt fatt.”
\item[126] Falkanger, p. 239: “Herved er det ikke sagt at det skal anlegges en rent objektiv målestokk: Kravene vil nok kunne variere noe etter hevderens forutsetninger.”
\item[127] Falkanger, p. 241: “Den gode tro må være tilstått gjennom hele hevdstiden.”
\item[128] Falkanger, p. 243: “Skal man hevd, må det utøves en rådighet som er i strid med hva hevderen egentlig har rett til – for så lenge det skjer en bruk som er rettmessig, har rette eier ingen foranledning til å gripe inn.”
\item[129] Falkanger, § 25.5
\end{footnotes}
A second form is prescription of usage (brukshevd).\textsuperscript{130} Total and partial rights of usage may be prescribed. A total right of usage implies possession in good faith of the good. A partial right of usage is for example a right of way. The requirements are by and large the same as those for proprietal prescription.\textsuperscript{131}

However, once the beneficiary of the prescription of usage has acquired a right, he cannot stop the owner from exercising rights that do not conflict with, for example, the servitude which he has acquired. Also, his right can be modified or terminated according to the rules that apply to, for example, servitudes.

It is also possible for a larger group of persons (e.g. villagers) to benefit from the prescription of usage. In such a case, at least 50 years must pass.\textsuperscript{132} The good faith requirement is somewhat different here. It cannot reasonably be expected that each and every villager must be in good faith. So the standard becomes whether or not most people fulfil the good faith requirement.\textsuperscript{133}

A third figure is counterprescription (mothevd).\textsuperscript{134} So far, we have looked at the effects of prescription on the one true owner. Here the focus will be on the consequences for a third party. For example, A buys a property and does not know that it is affected by a servitude. He hinders access to the property by removing the road that was used by the beneficiary of the servitude. Counterprescription occurs when a use of the good is made in such a way that it has a detrimental effect on the right(s) of a third party. If the counterprescription is successful, the third party’s right will eventually be extinguished.\textsuperscript{135}

Here, it is required that there must be a use that goes against the rights of a third party.\textsuperscript{136} Thus there must be a positive act or an action that hinders the rights of that third party. This use must also take place throughout the required period (20 years for immobile goods, 10 years for mobile goods). And, of course there is the requirement of good faith.

By nature, grunnbyrder\textsuperscript{137} cannot be affected by counterprescription. It is not possible that a use that goes against the rights of a third party is made of such a right. Then again, Brækhus & Hærem state that a grunnbyrde connected to a particular institution can disappear

\textsuperscript{130}Falkanger, § 26.
\textsuperscript{131}Falkanger, p. 246: “Vilkårene for brukshevd i §§ 7 og 8 er stort sett de samme som ved eiendomshevd,...”
\textsuperscript{132}Hevdsloven, § 8.
\textsuperscript{133}Falkanger, p. 248: “God-tro-kravet må naturlig nok bli noe spesielt; avgjørende blir hva folk flest innen den krets som har utøvet bruken, har ment.”
\textsuperscript{134}Falkanger, § 27.
\textsuperscript{135}Falkanger, p. 249: “(...) har bruken gått på tvers av tredjemanns rett, må følgelig tredjemann (T) vike.”
\textsuperscript{136}Falkanger, p. 250: “(...) det må skje en motbruk.”
\textsuperscript{137}See supra, p. 13.
when the institution itself disappears. For example, the duty to deliver meat once a month to a particular nursing home can disappear if the nursing home is closed down. Also, looking back at our initial example, when a road is removed then not only will the beneficiary of the servitude lose his right to use that road, but the person responsible for maintaining the road will, by nature, no longer be able to comply with the grunnbyrde.\textsuperscript{138}

\textit{Eiendomshevd} and \textit{brukshevd} can be distinguished from \textit{mothevd}, because the first two lead to an acquisition whereas the latter leads to an extinction.

A fourth possibility is \textit{liberating prescription} (\textit{frihevd}).\textsuperscript{139} In case of counterprescription there is an action that eventually extinguishes the right of the third party. In this case, there is no such action. Here it is all about inaction.\textsuperscript{140} The behaviour of the third party is the centre of attention: if he does not use his right during the prescription period, it will be extinguished. This is closely related to the extinguishment of a right by way of passivity. The difference is that, in case of liberating prescription, the \textit{frihevderen} must be in good faith.\textsuperscript{141} Meaning that he did not know of or could not be aware of the existence of the third party’s right.

Liberating prescription affects total rights of usage and positive servitudes. Negative servitudes can, by nature, not be affected by this prescription. For example, if there is an interdiction to engage in commercial activities from a certain property, the beneficiary of the right can of course not lose his right when the person affected by the negative servitude does not do anything, said in a different manner: does not engage in commercial activities (and thus respects that negative servitude).\textsuperscript{142} Not engaging in commercial activities was precisely the point of the negative servitude.

The liberating prescription can occur as an \textit{accessory} to proprietal prescription.\textsuperscript{143} For example, A engages in a proprietal prescription against a piece of land owned by B. There is a pond on the land, and a third party C has the right to fish there. If C does not exercise his right to fish during the prescription period, his fishing right will disappear simultaneously with the

\textsuperscript{138} Falkanger, footnote 76, p. 250.
\textsuperscript{139} Falkanger, § 28.
\textsuperscript{140} Falkanger, p. 252: “Ved frihevd derimot er det ikke spørsmål om noen motbruk; oppmerksomheten konsentreres om den berettigede tredjemanns opptreden: Unnlater han å benytte sin rett i hevdstid, kan retten falle bort.”
\textsuperscript{141} Falkanger, p. 253.
\textsuperscript{142} Falkanger, p. 253: “Negative servitutter kan derimot ikke frihevdes: Rettighetshaveren efer en klausul som f.eks. forbyr handelsvirksomhet på naboeiendommen, skal naturligvis ikke kunne tape sin rett hvor den forpliktede ikke opptrer i strid med klausulen.”
\textsuperscript{143} Falkanger, p. 253: \textit{aksessorisk} frihevd.
extinction of B’s property right over the land. The liberating prescription can of course also be exercised independently.\textsuperscript{144} For example, A owns a lake and C does not use his right to fish in that lake during the prescription period.

Finally, a few words regarding use since time immemorial (alders tids bruk).\textsuperscript{145} Generally, it must be appreciated by looking at the facts before the court. But there are some requirements. First of all, there must be a use.\textsuperscript{146} There must have been an opportunity for the true beneficiary of the right to intervene, but conditions are not as strict as for prescription. The requirements for intensity, continuity and exclusivity are also milder as opposed to when we look at prescription.

Secondly, there must have been a use over a long period of time.\textsuperscript{147} Very often we are looking at timeframes varying between 100 and 150 years or even longer. However, timeframes between 50 and 100 years may also be acceptable if there is of compensation for the lesser duration by way of more intensive and exclusive use.

And finally, most people must have been in good faith.\textsuperscript{148} Here, reference is made to what was ‘common knowledge’ in a certain village.

\textit{§ 4. Mortgage/Pledge}\textsuperscript{149}

The law of securities is about securing a claim (pantekravet) in one or more specific goods (pantet).\textsuperscript{150} The goal has always been to secure the underlying claim\textsuperscript{151}, the law of securities serves no purpose in itself. If there is no underlying obligation, then there is no pant.\textsuperscript{152} Also, since 1857, a general right of mortgage/pledge on all the goods of the debtor has been outlawed.\textsuperscript{153} The debt covered by the pant is thus always limited, this is the principle of speciality (spesialitetssprinsippet).\textsuperscript{154} Not only is the debt which the mortgage/pledge seeks

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\textsuperscript{144} Falkanger, p. 254: selvstendig (eller særskilt) frihevd.
\textsuperscript{145} Falkanger, § 29.
\textsuperscript{146} Falkanger, p. 258.
\textsuperscript{147} Falkanger, p. 259.
\textsuperscript{148} Falkanger, p. 259: “Hvor det er mange pretendenter – f.eks. de som bor i en grend eller bygd –, kan det ikke kreves at samtlige er i god tro.”
\textsuperscript{150} Skoghøy, p. 45.
\textsuperscript{151} Skoghøy, p. 46: “det underliggende forhold.”
\textsuperscript{152} Skoghøy, p. 46: “Dersom det i tilknytning til en panterett ikke er etablert noe underliggende forhold, foreligger det heller ikke noen reell eller effektiv panterett.”
\textsuperscript{153} Skoghøy, p. 60.
\textsuperscript{154} Skoghøy, p. 63.
to secure limited, also the good which secures that debt must be individualized.\textsuperscript{155} These are the two aspects of the principle of speciality.

We can distinguish between several forms of mortgage/pledge\textsuperscript{156} depending on how it is created: by agreement (avtalepant), by the authorities (utleggspant) or by law (legalpant).\textsuperscript{157} The Panteloven applies to both mobile and immobile goods.

A mortgage/pledge may be perfectly valid between the parties that have agreed upon it, but in order for it to be legally protected\textsuperscript{158} against third parties a separate act is required. This may be registration in a realregister for certain mobile or immobile goods (called tinglysning), delivery (called overlevering) etc.\textsuperscript{159} Examples of realregistre are the grunnbok\textsuperscript{160}, skipsregister\textsuperscript{164} and the luftfartøyregister.\textsuperscript{162}

The law of securities has developed from a construction in which ownership was used.\textsuperscript{163} Either the good was sold to the creditor, who would then become the owner, with a right to redeem the good upon fulfilment of the obligation for the debtor (resolutivt betinget eiendomsrett). Or the creditor would become the owner and would have the right to take over the good if the obligation was not fulfilled (suspensivt betinget eiendomsrett). The first figure would gradually develop into the håndpant: the debtor loses possession of the good. The second figure would gradually develop into the underpant: the debtor retains possession of the good.

To see which claim the security covers a distinction must be made between ‘real’ letters of security (reelle pantebrev), ‘made’ letters of security (gjorte pantebrev) and skadesløsbrev.\textsuperscript{164} In the first case (reelle pantebrev)\textsuperscript{165}, that what is secured is expressly mentioned in the letter itself. If it is not mentioned, it is not covered. The debtors permission is required in order to let the pant apply to other claims.

\textsuperscript{155} Skoghøy, p. 64.
\textsuperscript{156} In Norwegian: pant.
\textsuperscript{157} Skoghøy, p. 47.
\textsuperscript{158} This legal protection is called rettsvern in Norwegian.
\textsuperscript{159} Skoghøy, p. 55-56.
\textsuperscript{160} The grunnbok is for immobile properties (land).
\textsuperscript{161} The skipsregister is for ships.
\textsuperscript{162} The luftfartøyregister is for airplanes.
\textsuperscript{163} Skoghøy, p. 47.
\textsuperscript{164} These distinctions only apply to the avtalepant.
\textsuperscript{165} Skoghøy, p. 48-49.
In the second case (gjorte pantebrev)\textsuperscript{166} we deal with a security which is not contained in the pantebrev itself. Here, we must look at what the parties have declared and how they have acted in order to determine what claims are covered by the security.

Thirdly (skadesløsbrev)\textsuperscript{167}, letters of security which do not express a relationship of debt but which cover an uncertain or fluctuating debt. In order to resolve the question of which claims that are covered by the security, one must interpret the pantebrev itself. In addition, the actions and declarations of the parties will be taken into account.

\textbf{§ 5. Collective Rights and Rural Common Rights}\textsuperscript{168}

Firstly, we will deal with collective rights, then with rural common rights. The main difference between the two is the fact that collective rights can be exercised by anyone, whereas rural common rights can only be exercised by a specific group of people.

\textbf{Collective rights (allemannsretten)}\textsuperscript{169} have existed for a very long time in Norway. This means that the general public has rights over private properties, whether they are owned by individuals or the State. These rules were written in the Friluftsloven av 28. juni 1957 nr. 16.

The most important right is the right to walk (ferdselsretten) over someone else’s property. The extent of this right depends on what kind of property we are talking about. Cultivated land and the area around an inhabited house enjoy more protection as opposed to far away mountain areas. The legislator has used the criteria inland (innmark) and outland (utmark).\textsuperscript{170} The innmark is the plot directly surrounding the house, the farm, cultivated land and areas where trees have been planted. It has been defined as those areas “necessary to protect house and home.”\textsuperscript{171} Everything which is not innmark is utmark.\textsuperscript{172} In the utmark people are free to go wherever they want all year round. They also have the right to use boats on lakes and near the shore. In the innmark, collective rights are subject to more limitations. For example, one may only pass over such land on ski’s during the winter and never near a home or farm.

\textsuperscript{166} Skoghøy, p. 49-50.
\textsuperscript{167} Skoghøy, p. 51.
\textsuperscript{168} Falkanger, Kapittel X – Allemannsrett og almenningsrett, p. 351.
\textsuperscript{169} Falkanger, § 43, p. 351.
\textsuperscript{170} Falkanger, p. 351.
\textsuperscript{171} In Norwegian: “trengs for å frede hus og heim.” (Falkanger, p. 351)
\textsuperscript{172} Falkanger, p. 351: “Det som ikke er innmark, er utmark.”
Another component is the right to put up a tent in combination with the right to swim and other activities that involve staying in a specific location (retten til tellslagning, badning og annet opphold). These rights are subject to limitations: tents may only be put up at least 150 m. away from an inhabited house and may not remain there for more than two days without the owner’s permission.

Other rights can exist, even though not contained in the Friluftsloven such as the right to pluck wild berries, mushrooms, flowers and wild herbs. These may also be taken. An exception applies to cloudberries (multebær) in the three northernmost counties or fylker. Picking cloudberries is a privilege of the owner of the land. Usually, the right to hunt and to fish is also a privilege of the proprietor, but exceptions do apply.

Those that make use of the allemannsrett must behave themselves appropriately (fare frem som folk). If not, they can be expelled, or a claim for damages can be lodged against them.

Secondly, there are the rural common rights (almenningsrett). This right is one of the oldest institutions in the Norwegian legal landscape. An often repeated definition is the one by Olsen: an almenning is an area where one or more villages have a right of usage protected by law. These are rights exercised by the owners of farms in villages in the vicinity of utmark. They can only be found connected to the use of a farm and can only be exercised by the person that owns such a farm. This is the main difference between these rights and collective rights, which can be exercised by anyone. Only a specific group of people can be the beneficiary of rural common rights. They cannot be sold or mortgaged/pledged separately. They are limited real rights, since the needs of the farm limit to what extent they may be used. Rural common rights may not exceed the needs of a farm.

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173 Falkanger, p. 353.
174 Norway’s three northernmost counties are: Nordland, Troms and Finnmark.
175 Falkanger, p. 354.
176 Falkanger, p. 354.
177 Falkanger, § 44, p. 356.
180 Falkanger, p. 356: “Bruksrettighetene er knyttet til gårdsbruket; de kan bare uteses av den som til enhver tid er eier av vedkommende gårdsbruk (...)
181 Falkanger, p. 356-357.
182 Falkanger, p. 357: “Men det er en realrettighet av en begrenset karakter, idet gården’s behov setter en yttergrense for bruksutøvelsen.”
The specific rights connected to such *almenninger* depend on the nature of the area and the use that has been made of it throughout history. Generally, these include the right to take wood, the right to let animals graze and finally the right to fish and hunt.\(^{183}\)

A distinction must be made between *statsalmenninger* (owned by the state) and *bygdealmenninger* (owned by a village).\(^{184}\) The party who is the owner of such a rural common right will be entitled to exploit it in a way that goes beyond the normal rights of usage by the villagers. For example, the state will have the right to put the waterfall to use to generate power (e.g. Fron statsalmenning, *Norsk Retstidende* 1963, p. 1263). Thus the remaining value, after satisfying the beneficiaries of the rural common right, is there for the owner.\(^{185}\) In 1992, the number of *bydgealmenninger* amounted to about 51 while the number of *statsalmenninger* was 205.

*Bygdealmenninger* are controlled by a committee that comprises between three and seven members. The committee represents both the interests of the owner and the people that have a right of usage. There will be a chairman in charge of daily operations, a plan on how to make use of the woods, and a set of rules (drafted by the committee and approved by the state). There will also be a treasurer responsible for financial operations and bookkeeping regarding the *bygdealmenning*.\(^{186}\) A set of similar rules is in place for *statsalmenninger*.

Very recently, some changes have been introduced that greatly affect the county of Finnmark. The Finnmark Act (*Finnmarksloven*) was adopted by the Norwegian Parliament (*Stortinget*) in June of 2005.\(^{187}\) It will enter into force in the summer of 2006. Then, the Finnmark Estate (*Finnmarkseiendommen*) will take over from state-owned Statskog SF. Up until that point in time the Norwegian state owned approximately 96 % of the land in Finnmark fylke through Statskog. After the entry into force of the new law, the Finnmark Estate will be the largest private landowner in Norway.\(^{188}\)

The Finnmark Estate is composed out of a board of six people. Three of them are elected by the Finnmark County Council (*Finnmark fylkesting*) and three are elected by the Sami Parliament (*Sametinget*).\(^{189}\) The Finnmark Act was created against the backdrop of the

\(^{183}\) Falkanger, p. 359.
\(^{184}\) Falkanger, p. 357: “Alt efter hvem som eier almenningen, sondres det mellom stats- og bygdealmenninger.”
\(^{185}\) Falkanger, p. 365: “Restverdien etter at de bruksberettigede har fått dekkt sitt, tilfaller i prinsippet eieren.”
\(^{186}\) Falkanger, § 44.51 *Styringsreglene i bygdealmenningene.*
\(^{188}\) Owner of 45.000 km².
\(^{189}\) Source: [http://www.finnmarksloven.no/](http://www.finnmarksloven.no/)
Sami people’s struggle for more rights, and especially more rights in land. The 
Finnmarkskommisjonen will clarify rights to land and water in Finnmark.190 Disputes will be 
dealt with by the Utmarksdomstolen for Finnmark.191

§ 6. The Influence of Public Law

The authorities sometimes impose quite farreaching limits upon the acquisition of 
land. These limits are imposed in order to prevent efficient units from being parcelled and 
becoming less effective.192 For example, dividing certain plots can go against the effective use 
of a larger area in which those plots are situated. Another example: a plot of land may not be 
divided until decisions are made regarding how the area will be exploited. Other example: 
farms may not be divided without prior authorisation from the Provincial Farming Council 
(fylkeslandbruksstyret). Even plots of land that have different registration numbers will be 
considered to be a single plot if they “for the last five years have had the same owner and, 
according to the Provincial Farming Council, are to be considered as one economic unit”.193 
Authorisation to parcel out will not be given if the division will not be economically 
responsible. The government also intervenes through expropriation and acquisition control.194

The Law on Concessions of 1974 (Konsesjonsloven 1974) and the Industrial 
Concessions Law of 1917 (Konsesjonsloven 1917) are important.195 Acquiring immobile 
property or rights on immobile property requires governmental authorization. This goes back 
to the Citizenship Rights Law of 1888 (Statsborgerretsloven 1888).196 In those days, the law 
was directed against foreigners. Today it applies to Norwegian citizens and foreigners alike. 
Therefore these rules are a powerful instrument for state control regarding immobile goods 
and, as a consequence, to regulate part of Norway’s businesses.

The most important elements of the Law on Concessions 1974 are that the acquisition 
of immobile property is subjected to control by the public authorities.197 If a concession is 
given, conditions may be imposed. The rights that apply to fixed property (such as a renting a

190 Finnmarksloven, § 5.
191 Finnmarksloven, § 36.
192 Falkanger, p. 337.
193 Falkanger, p. 337: “dei siste 5 åra har vore på samme eigarhand og etter fylkeslandbruksstyrets skjønn må 
reknast som ei driftseining”.
194 Falkanger, § 40.3
195 Falkanger, p. 343.
196 Falkanger, p. 343.
197 Falkanger, p. 345: “Hovedregelen i § 2 er at ethvert erverv av fast eiendom er konesjonspliktig.”
building) are affected by the Law on Concessions. In order to make the control of immobile property effective, indirect acquisition (typically through shares) is often subjected to the Law on Concessions as well. This law has also been linked to the government having a right of priority when immobile property is sold: if there is a duty to seek concession from the public authorities, there may exist a right of priority for the government. It is worth bearing in mind that these restrictions seem way harsher on paper than they turn out to be in practice.

If A acquires immobile property from B and if the concession request is not granted, then that does not mean that the agreement between A and B is not binding or disappears. The law states that it does not intervene in the legal relationship between A and B. It is so that, if A’s concession request is not met with a positive answer, he may not keep the property. He must get rid of it. He can transfer it back to B (but B is not required to accept it, unless a contractual provision states otherwise) or he can transfer it to a third party.

The main rule is that every acquisition of immobile property is subjected to the Law on Concessions. It does not matter whether the property is big or small, very valuable or not at all, with or without buildings, in a city or on the countryside etc. How it is acquired does not matter either. It may be by way of sales, it may be a gift, an inheritance etc.

Yet there are exceptions which soften these apparently harsh rules. Some exceptions are linked to the person of the buyer, others are linked to the nature of the property. Concession is not required for acquiring a plot of land to build a house or a cabin in a certain community, if the acquirer (or his family) do not already own a plot there. Also, it is possible to acquire a plot of land for a house and another piece of land for a hut within the same community. A major exception is that concession is not required for the acquisition of buildings, whether they be houses, apartments, cabins, industrial buildings etc. Neither is concession required when children take over the property of their parents. These are only the most important exceptions, there are others.

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198 Falkanger, p. 344.
199 Falkanger, p. 345: “Hovedregelen i § 2 er at ethvert erverv av fast eiendom er konsesjonspliktig. Hvorvidt eiendommen er liten eller stor, meget eller lite verdifull, bebygget eller ubebygget, beliggende i by eller på land, osv., er uten betydning”.
200 Falkanger, p. 345: “Heller ikke spiller det noen rolle hva ervervsgrunnlaget er: kjøp, gave, arv, tvangsauksjon, ekspropriasjon osv.”
201 Falkanger, p. 346.
202 Ibid.
203 Falkanger, p. 346: “Videre kan man eft nr. 2 konsesjonsfritt erverve bebygget eiendom av en hvilken som helst karakter (enebolig, leiegård, fritidshus, industribygg, osv.).”
Conclusions:

This paper taught me that there still is a lot to discover about Scandinavian law. Especially when taking into account that this only was a summary introduction to the vast domain of just this one aspect of one branch of one Scandinavian country’s law.

Coming to a conclusion is not that easy. It is sometimes difficult to discern whether one has fully understood the foreign legal concepts or whether they resemble one’s own familiar legal constructs to a point where similarity may seem rather obvious, even though it is not.

Still, some things come to mind: Norwegians have a pragmatic legal approach, as is illustrated by the concept of the gradual transition of the right of ownership. Also, Norway still uses legal institutions and traditions which have survived for a long time and which are applied to this day, such as the odelsrrett, the allemannsrett and the institution of the almenninger.

Norwegian law does seem to be a system of its own indeed and there is much more to discover. Unfortunately, its language seems to be an often unsurmountable obstacle to continental jurists. I hope that, through this paper, Norwegian property has maybe been clarified a bit in that sense that some people have become curious. So the sole ambition of this paper is to guide the way, to indicate points of interest and concepts and ideas that can maybe be explained in a different way by others.

Finally, I would like to thank Tanja van der Meer, my supervisor. If this paper does indeed provide some sort of general introduction to Norwegian property law, then she alone can be credited with this (all mistakes and omissions in this paper are the sole responsibility of the author).

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