Contents

1 Introduction and Summary of Main Themes

> Thieves respect property; they merely wish the property to become their property that they may more perfectly respect it.[1]

> [Granting] a takings power, then, may not be viewed as an act that wrenches away property rights and places an asset outside the world of property protection. Rather, it may be seen as an act within the larger super-structure of property.[2]

Property can be an elusive concept, especially to property lawyers.[3] Indeed, in the law of property, the word itself often only functions as a metaphor – an imprecise shorthand that refers to a complex and diverse web of doctrines, rules, and practices, each pertaining to different "sticks" in a bundle of rights.[4] So is property as a unifying concept lost to the law? It certainly seems hard to pin it down. In the words of Kevin Gray, when a close scrutiny of property law gets under way,

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1 G.K. Chesterton, *The man who was Thursday: A nightmare.*

2 Abraham Bell, Private Takings, p. 583.

3 See, e.g., Kevin Gray, 'Recreational Property' in Susan Bright (ed), *Modern studies in property law: Volume 6* (Hart Publishing 2011) ("But then, just as the desired object comes finally within reach, just as the notion of property seems reassuringly three-dimensional, the phantom figure dances away through our fingers and dissolves into a formless void.").

4 See generally Thomas C Grey, 'The Disintegration of Property' in James Roland Pennock and John W Chapman (eds), *Nomos XXII, Property* (New York University Press 1980); Daniel B Klein and John Robinson, 'Property: A Bundle of Rights? Prologue to the Property Symposium' (2011) 8(3) Econ Journal Watch 193.

property itself seems like it "vanishes into thin air".[5]

Arguably, however, property never truly disappears.[6] Indeed, there is empirical evidence to suggest that humans come to the world with an innate concept of property, one which pre-exists any particular arrangements used to distribute it or mould it as a legal category.[7] Specifically, humans and a seemingly select group of other animals appear to have an intuitive ability to recognise *thievery*, the taking of property (not necessarily one's own) by someone who is not entitled to do so.[8]

Taken in this light, Proudhon's famous dictum "property is theft", might be more than a seemingly contradictory comment on the origins of inequality.[9] It might point to a deeply rooted aspect of property itself, namely its role as an anchor for the distinction between legitimate and illegitimate acts of taking.

In this thesis, I will study takings of a special kind, namely those that are sanctioned by a government in the pursuit of some public use or interest. That is, a taking will be used to refer to an exercise of the government's power of eminent domain.[10] In legal language, especially in the US, takings by eminent domain are often referred to as takings *simpliciter*, while talk of other kinds

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5 See Kevin Gray, 'Property in Thin Air' (1991) 50(2) The Cambridge Law Journal 252, 306-307. See also Grey, 'The Disintegration of Property' (n 4) 81 (arguing that the eventual consequence of the bundle view is that property will cease to be an important category for legal and political reasoning).

6 See Kevin Gray, 'Equitable Property' (1994) 47(2) Current Legal Problems 157, 159 ("We are continually prompted by stringent, albeit intuitive, perceptions of 'belonging'.").

7 See Jeffrey Stake, 'The Property "Instinct"' in Semir Zeki and Oliver Goodenough (eds), *Law and the Brain* (Oxford University Press 2006).

8 See Sarah F Brosnan, 'Property in nonhuman primates' (2011) 2011(132) New Directions for Child and Adolescent Development 9, 11-13; Gray, 'Equitable Property' (n 6) 159.

9 For the origin of the dictum, with further references, see 'Property is theft!' (*Wikipedia, the free encyclopedia*, 26th July 2015) ⟨https://en.wikipedia.org/w/index.php?title=Property_is_theft!&oldid=673129813⟩ accessed 9th September 2015.

10 See generally William B Stoebuck, 'A General Theory of Eminent Domain' (1972) 47 Washington Law Review 553 (clarifying the status of the notion from a US perspective, tracing its roots back to early civil law writers such as Grotius and Bynkershoek). Takings will also be referred to as expropriations, especially in the context of Norwegian law. In England and Wales, the corresponding notion is that of compulsory purchase. The notion of a taking is sometimes drawn wider, for instance to include takings by adverse possession, but there will be no need to do so in this thesis. For an example of a wider definition, see Emma J L Waring, 'Aspects of Property: The Impact of Private Takings' (PhD Thesis, 2009) 19-21.

of "takings" require further qualification, e.g., in case of "takings" based on contract, taxation, or adverse possession.

The US terminology is intuitive and helps bring the issue of legitimacy to the forefront, so I will adopt it throughout this thesis. Clearly, taking is not the same as theft. However, it is not necessarily that far removed from it either, especially not for those who loose their property. Granted, the default assumption is that takings by the power of eminent domain are legitimate. But if they are not, one may well be tempted to call them by a different name.[11]

More generally, the idea that the government's power to take is not unlimited seems fundamental. Indeed, the expectation that an owner might find occasion to resist an act of taking, and may or may not have good grounds for doing so, appears fundamental to our pre-legal intuitions.[12] But how should we approach the question of legitimacy of takings from the point of view of legal reasoning, and what conceptual categories can we benefit from when doing so? This is the key question that is addressed in this thesis, for the special case of so-called *economic development takings*.[13]

Such takings occur when a government sanctions the taking of property to stimulate economic growth. The canonical example is *Kelo v City of New London*, which brought the category of economic development takings into focus in the US, resulting in great controversy and a surge of academic work on legitimacy of takings.[14]

The *Kelo* case concerned a house that was taken by the government in order to accommodate

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11 See Gray, 'Recreational Property' (n 3) 8-10 (discussing case law from the US, including descriptions of illegitimate takings as "plunder", "rapine", and "robbery").

12 See, e.g., Gray, 'Equitable Property' (n 6) 159.

13 For a sample of scholarship based on this term, see Charles E Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (2006) 29 Harvard Journal of Law and Public Policy 491; Ilya Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' English (2007) 15(1) Supreme Court Economic Review 183; Michael Paul Wilt, 'Intermediate scrutiny for economic development takings: proposing a new test based on Justice Kennedy's Kelo concurrence' (2009) 31(2) Thomas Jefferson Law Review 431; David S Yellin, 'Masters of Their Own Eminent Domain: The Case for a Reliance Interest Associated with Economic Development Takings' (2011) 99 Georgetown Law Journal 651.

14 *Kelo v City of New London* 545 US 469 (2005).

private enterprise, namely the construction of new research facilities for Pfizer, the multi-national pharmaceutical company. Several home-owners, among them Suzanne Kelo, protested the taking on the basis that it served no public use and was therefore illegitimate under the fifth amendment of the US Constitution. The Supreme Court eventually rejected her arguments, but this decision created a backlash that appears to be unique in the history of US jurisprudence.

In their mutual condemnation of the *Kelo* decision, commentators from very different ideological backgrounds came together in a shared scepticism towards the legitimacy of economic development takings.[15] Interestingly, their scepticism lacked a clear foundation in US law at the time, as the *Kelo* decision itself did not appear particularly controversial in light of established eminent domain doctrines in the US.[16] Hence, when the response was overwhelmingly negative, from both sides of the political spectrum, it seems that people were responding to a deeper notion of what counts as a legitimate act of taking.[17]

If the law is about delivering justice to the people, widely shared intuitions about legitimacy deserve attention from legal scholars. In the US, legitimacy intuitions pertaining to economic development takings have received plenty of it after *Kelo*. In the context of US law, it is now hard to deny that *Kelo* belongs to a separate category of takings that raises special legal questions.[18] As this change in the narrative was largely the result of a popular movement, there is reason to think that economic development takings is a powerful conceptual category, also outside of the US.

As soon as cases like *Kelo* are portrayed as being primarily about bestowing a benefit on

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15 See generally Ilya Somin, 'The Politics of Economic Development Takings' (2008) 58 Case Western Reserve University Law Review 1185.

16 See, e.g., Abraham Bell and Gideon Parchomovsky, 'The Uselessness of Public Use' (2006) 106(6) Columbia Law Review 1412, 1418 ("The most astounding feature of *Kelo*, as even the case's harshest critics agree, is that from a legal standpoint, the ruling broke no new ground.").

17 See Bell and Parchomovsky, 'The Uselessness of Public Use' (n 16) 1413-1415 ("Everyone hates *Kelo*", commenting on how criticism was harsh from across the political spectrum).

18 See, e.g., Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (n 13); Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' (n 13).

powerful commercial interests, it is natural to expect that people will have a tendency to question their legitimacy, irrespective of differences in the surrounding legal framework. Two questions arise. First, when is it appropriate to deride economic development takings in this way? Second, if it is appropriate, should the law provide a basis for the courts to intervene, to strike down illegitimate takings?

Both of these questions will be addressed in this thesis. To address them effectively, it should be acknowledged from the start that there is at least a *risk* that takings for economic development can be improperly influenced by commercial interests. The risk of such capture, moreover, is clearly higher in economic development situations than in cases when takings take place to benefit a concretely identified public interest, such as the building of a new school or a public road. Hence, it seems intuitively reasonable to single out economic development takings for special attention at the political and normative level. However, should the categorisation also be recognised as a basis for justiciable restrictions on the use of eminent domain?

This is not obvious, as it conflicts with the prevalent idea that governments enjoy a "wide margin of appreciation" when it comes to their use of eminent domain.[19] However, as the US debate shows, it might be hard to deny judicial review as soon as the special features of economic development takings are brought into focus. This points to the first main theme of this thesis: an analysis of economic development takings as a conceptual category for legal reasoning.

1.1 Economic Development Takings as a Conceptual Category

In Part I, this thesis will argue that the category of economic development takings should be recognised already at the theoretical level. However, this claim will be made relative to a theory

[19] See *James and others v United Kingdom* (1986) Series A no 98, para 54.

of property that is broader than typical approaches to property in legal scholarship. Specifically, the theory of property that will form the backbone of this thesis will encompass more than just the entitlements of owners.[20]

The theoretical framework is discussed in more depth in Chapter 2. There it will be argued that a social function understanding of property should be adopted, with an emphasis on human flourishing as the normative foundation for private property.[21] In short, property should be protected because it can help people flourish.[22] Moreover, property is meant to serve this function not only for the owners themselves, but also for the other members of their communities.[23]

This ambitious take on property must necessarily also give rise to a broader assessment of legitimacy when the state interferes.[24] This, in turn, is what inspires my initial discussion on economic development takings in the first chapter. There I will present the basic definition of the notion and discuss the *Kelo* case in some more detail. Specifically, I will argue that Justice O'Connor's strongly worded dissent – finding that the taking should be struck down – is consistent with, and subtly conducive to, a social function perspective on property.[25]

Chapter 3 follows up on this by studying the legitimacy of economic development takings in more depth. Several approaches to this issue are considered, culminating in a recommendation for a perspective based on institutional fairness that I trace to recent developments at the ECtHR. Specifically, the Court in Strasbourg has begun to look more actively at the systemic reasons why

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20 For a famous entitlements-based view of private property, see Guido Calabresi and ADouglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85(6) Harvard Law Review 1089.

21 For human flourishing theories of property generally, see Gregory S Alexander and Eduardo Peñalver, *Community and Property* (Oxford University Press 2010) Chapter 5.

22 See also Colin Crawford, 'The Social Function of Property and the Human Capacity to Flourish' (2011) 80(3) Fordham Law Review 1089, 1089.

23 See generally Gray, 'Equitable Property' (n 6); Gregory S Alexander and Eduardo M Peñnalver, 'Properties of Community' (2009) 10 Theoretical Inquiries in Law 127; Gregory S Alexander, 'Property's Ends: The Publicness of Private Law Values' (2014) 99(3) Iowa Law Review 1257.

24 See also Laura S Underkuffler, 'Kelo's moral failure' (2006) 15(2) William & Mary Bill of Rights Journal 377.

25 See *Kelo* (n 14) 494-505.

violations of human rights occur, in order to address structural weaknesses at the institutional level in the signatory states.[26] This approach is arguably the one that fits best with the sort of analysis carried out by Justice O'Connor in *Kelo*, more so than the approach usually induced by the public use restriction in the US Constitution.

Importantly, the institutional perspective appears to be a sensible middle ground between procedural and substantive approaches to legitimacy, directing us to focus on decision-making processes and structural aspects without giving up on substantive fairness assessments. To strike a fair balance, in particular, is not just about reaching an appropriate outcome, but also about how that outcome came about, and how often dubious outcomes are likely to result from the way the system is organised. This way of thinking about legitimacy brings me to the second focus point of the thesis.

1.2 A Democratic Deficit in Takings Law?

To make the theoretical work on legitimacy more concrete, Chapter 3 provides a proposal for a legitimacy test that can be applied to economic development takings. This test consists of a list of indicators that can suggest eminent domain abuse. The first six points are due to Kevin Gray, while the final three are additions I propose on the basis of the work done in this thesis.[27] I call the resulting list the Gray test, a heuristic for inquiring into the legitimacy of an economic development taking.

Arguably, the most important indicator is also the least precise, namely the one pertaining to the *democratic merit* of the taking (one of my additions). By itself, such a broad indicator might not offer much guidance. However, the idea is that when taken together with the other points, this

[26] See generally P Leach and others, *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgments' of the European Court of Human Rights and Their Impact at National Level* (Intersentia 2010).

[27] For Gray's original points see Gray, 'Recreational Property' (n 3).

indicator will induce an overall assessment of the other points against the decision-making process as a whole, not only the final outcome. Hence, this addition is specifically aimed at emphasising the institutional fairness perspective. If a taking fails the legitimacy test on this point, moreover, it might indicate an existing weakness or a pernicious deterioration of the decision-making framework more generally.

Admittedly, asking courts to test for legitimacy is an incomplete response to the worry that illegitimate practices surrounding economic development takings signify a democratic deficit in takings law. Moreover, some US scholars have argued that increased judicial scrutiny is neither a necessary nor a sufficient response to concerns about the institutional legitimacy of takings such as *Kelo*.[28] Instead, these authors point out that the traditional takings procedure does not in any case seem particularly suited for bringing about this kind of economic development.

This observation has been accompanied by proposals for structural takings law reform, most notably the work of Heller and Hills.[29] This work proposes that a new type of institution, a so-called Land Assembly District, can replace the traditional takings procedure in cases where property rights are fragmented and the potential takers have commercial incentives. The basic idea is that the owners themselves should be allowed to decide whether or not development takes place, by some sort of collective choice mechanism (possibly as simple as a majority vote). In this way, the holdout problem can be solved (individual owners cannot threaten to block development to inflate the value of their properties). At the same time, however, the local community's right to self-governance is recognised and respected.

The proposal for Land Assembly Districts is linked to more general ideas about self-governance and sustainable resource management, particularly the theories developed by Elinor Ostrom and

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[28] See generally Amnon Lehavi and Amir N Licht, 'Eminent Domain, Inc.' (2007) 107(7) Columbia Law Review 1704; Michael Heller and Rick Hills, 'Land Assembly Districts' (2008) 121(6) Harvard Law Review 1465.

[29] See Heller and Hills (n 3).

others.[30] On the basis of a large body of empirical work, these scholars have formulated and refined a range of design principles for institutions that can promote good self-governance at the local level.[31]

At the end of Chapter 3, I argue that this work can be used to address the legitimacy of takings in a principled way, to arrive at refinements or alternatives to the proposal made by Heller and Hills. Specifically, it seems that alternatives to expropriation based on self-governance can be a powerful way to address the worry that economic development takings might otherwise be associated with a democratic deficit. At the same time, the context-dependence of solutions along these lines make sweeping reform proposals unlikely to succeed. Rather, it is important that the institutions that are used are appropriately matched to local conditions.[32]

For instance, a setting where property is evenly distributed among members of the local community might suggest a very different type of institution compared to a setting where the relevant property rights are all in the hands of a small number of absentee landlords. In short, the idea of using self-governance structures in place of eminent domain necessitates a more concrete approach, a move away from property theory towards property practice. This sets the stage for the second part of the thesis, consisting of a case study of takings for Norwegian hydropower development.

This first key objective of this case study is to apply the theory developed in the first part to analyse the legitimacy of takings for hydropower. The second objective is to study a concrete institutional alternative to expropriation in more depth, namely the system of *land consolidation courts*. In Norway, these courts are empowered to set up self-governance organisations for local

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30 See Elinor Ostrom, *Governing the commons: the evolution of institutions for collective action* (Cambridge University Press 1990). For the connection with property theory generally, see Elinor Ostrom and Charlotte Hess, 'Private and Common Property' in Boudewijn Bouckaert (ed), *Property Law and Economics* (Edward Elgar 2010); Carol Rose, 'Ostrom and the lawyers: The impact of Governing the Commons on the American legal academy' (2011) 5(1) International Journal of the Commons; LA Fennel, 'Ostrom's Law: Property Rights in the Commons' (2011) 5(1) International journal of the commons 9.

31 For a more recent empirical assessment (and refinement), see M Cox, G Arnold and SV Tomas, 'A Review of Design Principles for Community-based Natural Resource Management' (2010) 15(4) Ecology And Society 38.

32 See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 3) 92.

resource management and economic development, if necessary against the will of individual owners.

1.3 Putting The Theory to the Test

In Norwegian law, the story of legitimacy more or less begins and ends with the issue of compensation.[33] If an owner has grievances about the act of taking as such, not the amount of money they receive, takings law has very little to offer. In fact, it does not appear to offer anything that does not already follow from general administrative law. The owner can argue that the decision to take was in breach of procedural rules, or grossly unreasonably, but the chance of succeeding is slim.[34]

In cases involving hydropower development, the position of local owners is also affected by a number of additional variables that pertain specifically to the licensing framework in place to ensure government control over the use of water resources. Chapter 4 presents this framework in some detail, before discussing administrative practices and commercial practices characterising the hydropower sector today. A first important observation is that the hydropower sector in Norway was liberalised in the early 1990s.[35] This means that the hydropower companies that expropriate are now commercial enterprises, not public utilities.

A second important observation is that the right to harness the power of water is considered private property, typically owned by members of the rural community in which the resource is found.[36] However, as discussed in Part II of this thesis, hydroelectric companies in Norway have traditionally had easy access to these resources through the power of eminent domain.

Since deregulation, local owners have begun to resist such takings. This has been motivated by

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33 See generally Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015).

34 See Sjur K Dyrkolbotn, 'Expropriation Law in Norway' in JAMA Sluysmans, S Verbist and E Waring (eds), *Expropriation Law in Europe* (Wolters Kluwer 2015) 384-386.

35 The crucial legislative reform was the Energy Act 1990.

36 See Water Resources Act 2000, s 13.

the fact that owners can now undertake their own hydropower projects as a commercial pursuit; unlike the situation before liberalisation, owner-led development projects can now demand access to the electricity grid as producers on equal terms with established energy companies.[37] Unsurprisingly, this has led to heightened tensions between takers and owners, tensions that the water authorities are now forced to grapple with on a regular basis.

Chapter 4 sets the stage for studying these tensions in more depth. The chapter argues that despite their improved position following liberalisation, local owners remain marginalised under the regulatory framework. Specifically, despite political support for locally organised small-scale development, the large energy companies have continued to enjoy a privileged position in their dealings with the water authorities. Lately, the political narrative appears to be changing, with large-scale development becoming the preferred mode of exploitation also among politicians.

Building on these observations, Chapter 5 goes on to discuss expropriation of waterfalls in more depth. Specifically, the chapter tracks the position of owners under the law and administrative practice. The key finding is that expropriation is usually an *automatic consequence* of a large-scale development license.[38] That is, commercial companies that succeed in obtaining large-scale development licenses will almost always be granted the right to expropriate. This rights will be granted, moreover, without any assessment taking place as to the appropriateness of depriving local owners of their resources.

Moreover, the owners' position during the licensing assessment stage is extraordinarily weak.[39] The fact that expropriation tends to follow automatically from a license to develop has led the water authorities to regard the licensing question and the associated procedures as exhaustive in all cases. No distinction is made between cases involving expropriation and cases that do not. This

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37 See, e.g., *Agder Energi Produksjon AS v Magne Møllen* Rt-2008-82.

38 In some cases, this follows explicitly from the water resource legislation, while in other cases it follows from administrative practice. For further details, see below in Chapter 5, Section 5.3.

39 See especially the discussion in Chapter 5, Sections 5.6 and 5.7.

has a dramatic effect on the level of protection available to local owners. According to written testimony during a recent Supreme Court case on legitimacy, the water authorities do not even recognise a duty to inform local owners of pending applications that will involve expropriation.[40]

In relation to the compensation issue, the owners' position initially improved after liberalisation, as the lower courts began to compensate local owners on the basis of what they lost from being unable to carry out their own development project.[41] This led to a dramatic increase in compensation payments compared to earlier practice.[42] However, a recent decision from the Supreme Court appears to largely reverse this development, since a large-scale license may now itself be considered proof that alternative development by owners was always unforeseeable.[43]

In light of this and other data discussed in Chapter 5, my conclusion is that today's typical takings for hydropower do not appear to pass the Gray test. However, Norwegian law also offers a promising institutional path towards the restoration of legitimacy in economic development contexts. Specifically, the institution of land consolidation, as understood in Norway, could serve such a function. Moreover, it already does so in the context of hydropower development, when local owners wish to undertake development themselves but disagree about how it should be done. This brings me to the fourth key theme of this thesis.

1.4 A Judicial Framework for Compulsory Participation

The final key theme of this thesis, presented in Chapter 6, consists of an assessment of Norwegian land consolidation and its potential function as an alternative to takings when compulsion appears warranted to ensure economic development. This is an especially fruitful topic because land consol-

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40 See Chapter 5, Section 5.7. The case in question was *Ola Måland and others v Jørpeland Kraft AS* Rt-2011-1393.

41 See *Uleberg* (n 6).

42 See especially the discussion in Chapter 5, Section 5.5.1.

43 See *Bjørnarå and others v Otra Kraft DA, Otteraaens Brugseierforening* Rt-2013-612.

idation is presently being used in this way to facilitate hydropower development. The large energy companies never use it, but local owners often do.[44] In these cases, the consolidation courts have proved themselves highly effective in making self-governance work.

The land consolidation alternative can make a great difference, because it strives to ensure legitimacy through participation. The potential democratic deficit associated with compelled economic development is dealt with by efforts to raise owners to take active part in the management of their property in the public interest. At the same time, the procedure can be reasonably effective, since participation is compulsory and the judge may intervene to settle conflicts. In Chapter 6, I discuss possible objections to the procedure, but conclude that the continued development of the land consolidation institution provides the best way forward for addressing problems associated with economic development takings in Norway.

If the integrity of the procedure can be secured, adopting it to organise larger scale development involving external actors seems like a very promising approach to legitimacy more generally. Moreover, while the system is designed to work in a setting of egalitarian property rights, it is interesting to also consider the possibility key features of the procedure might also inspire solutions to the takings problem in other jurisdictions.

It might well be, for instance, that a land consolidation approach coupled with a human flourishing understanding of property can be a good way of including non-owners in the process. Possibly, a modification of the framework in settings where many property dependants do not have property rights, is to enlarge the set of legal persons with legal standing before the court. This might give rise to increased complexity of the procedure and new risks of abuse by local elites, but it seems like an interesting idea to explore in future work. In short, the consolidation alternative seems like a good starting point for an approach to legitimacy that truly takes into account a wider notion

[44] In 2009, land consolidation had facilitated a total of 164 small-scale hydropower projects with a total annual energy output of about 2 TWh per year (enough electricity to supply a city of about 250 000 people), see 2009 (Domstoladministrasjonen).

of what property is, and what it can and should be in a democracy where everyone is equal before the law.