

Rapport till Naturvårdverket kring allemansrätten i ett komparativt perspektiv

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Access to Nature between Ideology and Law – Summary

Introduction

The land owner's right to exclude gives rise to many complications for the jurist willing to explore the deceptively placid waters of Italian land law. At first sight, the law seems perfectly clear. According to Article 832 of the Italian Civil Code, the land owner has the right to enjoy her property in a "full and exclusive way," while Article 841 grants her the right to enclose the land as she sees fit. The Supreme Court of Cassation, as late as 1999, firmly declared that there is no such thing as a "right of access to nature," and that the right to exclude is a core tenet of the right of property.

The picture, however, becomes more confusing when a wider range of data is taken into account. Social activity, for instance, often ignores property boundaries. When no real damage has been done to the land, and when the 'trespassory' entrance takes place far away from a building, public access is normally regarded as socially acceptable. Moreover, the Court of Cassation has established, since the second half of the 19th century, that in certain circumstances certain kinds of private land can be converted to public enjoyment simply by the passage of time. Finally, many zoning regulations in the Alpine area forbid land owners from fencing land crossed by ski runs, forcing them to

accept the passage of skiers without compensation. The Constitutional Court, in a decision that will not be remembered for its conspicuous clarity, has established that these regulations are valid.

Italian lawyers can take comfort in knowing that these contradictions are not unique to Italy. Article 544 of the French Civil Code declares property to be exclusive, while Article 647 grants the landowner the right to fence her land. Nonetheless, the French legislature has explicitly protected the so-called “chemins ruraux,” ancient paths that run on private land in countryside areas, and has also established a principle of free access to the sea, allowing a sort of public easement over private land in order to facilitate public access to beaches. In England, traditionally, the right to exclude has been strongly safeguarded by the action of trespass. Even so, a vast web of “rights of way” covers the countryside, allowing third parties access across private land. In certain areas, so-called “village greens,” the community is allowed to roam on private land and engage in open-air activities. More importantly, in 2000, the English legislature enacted the Countryside and Rights of Way Act, which opened a vast amount of ‘open’ private land to public enjoyment: the so-called ‘right to roam’.

It would be a mistake, however, to assume that such tensions and contradictions are common to the whole of the western legal tradition. Scandinavian countries, and more specifically Sweden, Norway and Finland (this book focuses on the first two), are markedly different in their treatment of property rights. These legal systems recognize the so-called “*Allemansrätt*,” the right of the public to enter on private land in order to take a walk, pick a few wild berries or even spend the night in a tent. Since 1994, this right has been protected by the Swedish Constitution (‘*regeringsformen*’) at chapter 2 § 18, but it is not expressly regulated or defined by ordinary law. The limits of the *Allemansrätt* are inferred from provisions of criminal, civil and administrative laws. In Norway, since 1957, the right of the public to enter onto private land has been regulated by a specific statute (‘*friluftsloven*’). The basic rules can be summarized as follows: a stranger can enter onto land so long as she does not cause any damage (for instance trampling over sown fields), or roam in the proximity of a home, thereby intruding on the privacy of its owner.

The differences between the Nordic countries and other legal systems concerning the right to exclude are the symptoms of a much deeper phenomenon. It is possible, through the lens of the *ius excludendi* rules, to observe two profoundly different notions of property, which can conveniently be called “strong” property rights and “weak” property rights. The two adjectives refer to the different political role that the right of property has played in Nordic and non-

Nordic traditions and its centrality in the ethical, political and legal discourse of both.

In the “strong” model, the right of property has been celebrated as an “inviolable and sacred right” (Article 17 of the French Declaration of the Rights of Man and of the Citizen 1789). Property is perceived not simply as an economic and legal device used to organize economic relationships, but rather as a moral symbol. The owner is a better person by virtue of her property ownership, and property is considered the foundation of society. The “weak” model, instead, treats property more soberly. The main Nordic legal sources do not share the hyperbolic enthusiasm of the French codification, nor have Nordic legal scholars embraced William Blackstone’s definition of property as a “despotic dominion.”

The difference in treatment cannot, however, be regarded as a mere difference in rhetoric. It is, rather, the concrete outcome of two different evolutionary paths in the field of property rights, which have brought about very significant practical consequences. Of these, the most tangible are precisely the rules that govern public access to private land.

The aim of this book is to compare these two models, in order to discover how they have evolved and where they may be heading. The focus of the analysis is on the relationship between legal rules and the ideologies which underpin each model. The term “ideology” refers to a set of beliefs and principles that uphold the interests of a given social group. On the one hand, we will see how bourgeois ideology has played a crucial role in forging a rigid right to exclude in the “strong” property model; and on the other, we will see how a social-democratic ideology has favored a strengthening of the *allemansrätt* in Sweden. We will also see that the contradictions that have emerged in Italy, England and France probably have their roots in the critical weakening of bourgeois ideology, which has left many core legal concepts adrift from their social underpinnings.

From a methodological point of view, such a study requires historical investigation and engagement in cross-cultural analysis. The reason for this is that the rules we are dealing with are the product of a very long evolution. A mere analysis of present day legal rules would fail to address all of the social and cultural factors that have played a role in shaping each model. Property rights, much more so than other features of a legal system, are deeply influenced by philosophical and political ideas, as they are connected to such basic issues as survival, labor and social prestige. I have therefore drawn from a wide range of materials that are not strictly legal in nature, but also encompass political, philosophical and economic aspects of the subject. This study should not,

however, be confused with an historical work. History in this context is an analytical tool to the achievement of a better understanding of the present, and perhaps also to provide wise counsel for the future. It is not treated as ‘an end in itself’.

Chapter I - The Normative Foundation of the Right to Exclude: The Enclosure Movements in England and in France.

The first chapter is devoted to the so called “enclosure movement” in England and France.

England

In early medieval England, the majority of the land was farmed collectively, as open fields. Fences were used only to keep animals away from crops. Villages were surrounded by so-called “common land” – land which the peasants used collectively. A “right to exclude” in modern sense did not exist, and it would have been inconsistent with the prevailing production techniques for farming land.

The openness of land began to be curtailed after the 11th century. The Crown, after the Norman invasion, fenced large portions of woodland in order to preserve it for private hunting. At its peak, as much as one quarter of England was included in so-called “royal forests.” A villager, who entered on such an area to hunt, or even just to gather wood, could be punished with sanctions of extreme gravity, such as blinding and castration.

The continuous pressures from the Crown and the aristocracy against the common lands caused huge social tensions. Between the 11th and the 14th centuries, many rebellions ensued during which peasants protested by wrecking fences and cutting trees on lands from which they had been excluded. It is perhaps not a coincidence that, in this precise period, the English courts elaborated one of the most important forms of action in the history of the common law: that of trespass to land. This new legal device very effectively protected the right of the owner to exclude undesired persons. Merely putting a foot on the land, even if there was no physical fence or barrier, and even if no actual damage had occurred, could result in monetary fines damages, albeit nominal. A few centuries later, Blackstone, in his Commentaries on the Laws of England, stated that the writ of trespass had created an “ideal invisible boundary” which divided one field from the other, simply by operation of law. This fact

indicates the strong role legal rules played in early English society, but it also highlights the connection between strong protection of property rights and intense social turmoil.

Such social tensions diminished after the second half of the 14th century because of the great plague, which killed about one third of the population of Europe, and would not rise again in England until the Tudor dynasty in the late 15th century. In this epoch, England experienced a radical increase in trade. Particularly profitable was the trade of wool and, therefore, sheep-breeding, which was a land-intensive activity. This new market reignited the debate about the enclosure of common land, and between the 17th and the 18th century, new economic ideas fueled the discussion. During this period, the allocation of land to individuals was thought of by the ruling class as the best way to enhance economic productivity. It is therefore hardly surprising that between the end of the 18th and the end of the 19th century, Parliament itself decided to favor this approach to economic progress by initiating a vast reorganization of the English countryside. The result put much of the open land under the control of individual owners, and heavily reduced, or “rationalized”, the web of paths that allowed the free movement of the population.

Strong hostility against common or collective rights to land ownership could also be found in judgments from the law courts of the time. Two cases decided by the Court of Common Pleas, *Worlledge v. Manning* (1786) and *Steel v. Houghton* (1788), stand out as particularly significant. In these cases, the court refused to acknowledge the traditional right of the poor to glean on private land after the harvest, stating that the right to glean was incompatible with the absolute enjoyment that characterizes the right of property. But even when English courts recognized the existence of customary rights on private land, such as the right of the population to play games on a certain field (a so-called “village green”) or the right to walk on certain paths (right of way), these rights were interpreted in a very restrictive way. For instance, until the 1970s the owner of the land had no obligation to protect the passers-by from dangerous animals, such as bulls.

The enclosure movement in England can be seen as a conflict between two normative systems, one “official” (common law and statute law) and the other customary. It should be stressed, however, that the common law did not simply eradicate customary rights, but rather eroded them over a considerable time. The explanation for this lies, of course, in the peculiar nature of the common law, which evolves through decisions of the courts – institutions that, unlike legislators, avoid broad generalizations and proceed case by case. Because of this, the English legal system harbors phenomena that at first sight might seem

conflicting, like the action for trespass, which grants land-owners a very strong right to exclude, and customary rights granted to the public at large such as village greens and rights of way.

France

The presence of common rights and collective farming techniques in medieval times was not unique for England. On the contrary, it was a phenomenon that flourished in many parts of Europe, including France. As in England, the French aristocracy exerted considerable pressures against the “biens communaux”: and as in England, the phenomenon accelerated considerably during the 18th century under the influence of economic theories that favored individual ownership.

Despite these similarities, however, the French legal system’s evolution concerning the right to exclude took a profoundly different path. The two most important factors influencing France’s legal development were first, the decentralization of legal authority until the Revolution; and second, Roman law, which in France exerted great influence.

One prominent feature of common law jurisdictions is that, since a very early stage, they have been shaped by a group of centralized courts. In contrast, the French legal system until the Revolution was characterized by a considerable degree of fragmentation among its courts. The most obvious demarcation line consisted in the difference between the northern and the southern regions. While the northern area of the country was ruled by customary law of Germanic origins (Pays de droit coutumier), the legal system in the southern regions was instead heavily influenced by Roman law, preserved in two important written sources, the Lex Romana Wisigothorum and the Lex Romana Burgundorum (Pays de droit écrit). Roman law, however, was not completely ignored in the northern regions, especially in fields like contract law, where the Germanic tradition showed grave deficiencies. On the other hand, the expansion of Roman law throughout the whole of France was kept under control by the monarchy which, starting with Philip II Augustus, wanted to disentangle France from the Holy Roman Empire and therefore sought to avoid any connection with the imperial tradition.

Despite political hostility, Roman law, because of its cultural prestige, inexorably became the common ground of French legal science. It is therefore hardly surprising that French scholars embraced a legal theory which became very popular in most of continental Europe and which was used to conceptualize feudal relations: the theory of “double domain.” This theory was in fact the

merger of two very different notions: the Germanic idea of ownership and the Roman concept of “dominium.” The Germanic idea of ownership was the foundation of both the feudal system and the common rights on the land. The owner was not entitled to the land itself but rather to a particular benefit. Therefore it was entirely possible, and in fact normal, that each estate belonged to a pyramid of owners: the King, the tenant and the subtenant. In contrast, the Roman dominium implied control over the land itself and over all possible benefits that could be obtained therefrom. As a consequence, Roman law did not recognize more than one owner for each estate. The theory of double domain essentially respected the feudal structure, but described it according to Roman terminology. It envisioned a “dominium directum,” belonging to the lord, and a “dominium utile,” belonging to the tenant, or more precisely to the individual who controlled the land and made it productive.

The bond between French legal science and the Roman categories grew even stronger with the spread of rationalism and natural law ideas during the 16th century, as Roman law was perceived as both universal and rational. During this time, legal scholars started to describe the dominus utilis as the “propriétaire,” the owner in the fullest sense of the word. At the same time they tried to reduce aristocratic privileges in respect of land. This process eventually took on a strong political flavor, as the aristocracy, the lords who were entitled to the dominium directum, started to be perceived not only as useless, but even as obstacles toward economic growth. This course of ideas merged with the social aspirations of the bourgeoisie, who in the 18th century were economically and culturally dominant, but socially inferior to the aristocracy.

The outcome of these social and economic pressures was, of course, the French Revolution which had, among its most important goals, the complete destruction of the feudal system. On August 4, 1789 the French Constitutional Assembly announced the abolition of feudal rights. In reality, however, the last remnants of the feudal system were eliminated by a decree of July 17, 1793.

A second very relevant consequence of the Revolution was the centralization of legal authority in France which, after a decade of “droit intermédiaire,” was completed under Napoleon with the Civil Code 1804 (“Code”). The profound transformation of land ownership in France is made evident by Article 544, which declares that “property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes.” The shift from the Germanic concept of land ownership, one capable of tolerating multiple beneficiaries of the land, to an individualistic idea of an “absolute” property owner is transparent.

The consequences of this shift for the freedom of the people to roam on the land are well illustrated by article 647: “Every proprietor may enclose his estate (...)”. The Code granted power to the owner to close the land and hence the right to exclude.

Chapter II - The Ideological Framework of the Right to Exclude

Chapter II analyzes the cultural forces that favored the course of events summarized in Chapter I. The most important among them was “bourgeois ideology” - the set of values, beliefs and aspirations that supported the interests of the social group that had obtained political power through the French Revolution. Understandably, the cornerstone of this new ideological system was the right of property. Aristocratic power over land had its roots in the aristocrats’ relationship with the King, who was considered to have derived his power over land from God herself. Land was a source of power not only because of its economic value, but because of the feudal relations in which it was enshrined. The bourgeoisie, by contrast, based its power on one thing and one thing only: property. Unsurprisingly, property became an object of quasi-religious worship for the new social class.

Philosophically, this new attitude toward property clearly emerges in the writings of John Locke, who was the first natural law philosopher to affirm that property was not the product of the state. Instead, government had the duty to protect property rights without having an inherent right to infringe on them. This intellectual stance was welcomed by the bourgeois society of this time, which was worried by the political turmoil that in 1688 would lead to the English Glorious Revolution and was anxious to safeguard property from the actions of future governments. Another interesting and lasting trait of Locke’s thought was the attribution of moral and political virtues to land owners. Only those who were able to save enough income to become land owners had the right to exercise the highest political right: the right to undertake a revolution. On the other hand, those who consumed their whole salary for living (the majority of the population) were considered weak and idle.

During the second half of the 18th century, an important contribution to the establishment of the modern notion of property came from a lawyer, William Blackstone, whose Commentaries on the Laws of England were very influential both in England and, indeed, to an even larger degree, in the United States. The Commentaries contain one of the most quoted passages of Anglo-American legal literature: “There is nothing which so generally strikes the imagination, and

engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” Blackstone was well aware of the severe limitations to an individualistic notion of property that existed during his lifetime and that generally characterized English land law, which was essentially based on the old feudal rules. His words should therefore not be taken as a faithful description of the law of his time, but rather as the declaration of an ideal. He expressed a sentiment shared by the greater part of the English bourgeoisie, one that would fully blossom during the 19th century.

In France, the debate about the right to enclose land that took place during the 18th century was deeply influenced by the so called ‘physiocrats’, a group of thinkers who were among the very first to analyze economic phenomena in scientific terms. They firmly believed that the laws of nature, on which the universe was based, also included economic laws and the right of property. However, when they wrote about land or property, they did not refer to the stratification of rights typical of the feudal system. On the contrary they believed that the “true” owner of land was the so-called dominus utilis, the individual who directly controlled the land. The physiocrats showed great hostility to the common rights of the villagers. According to their economic theories, the owner should have full and solitary control over the land in order to encourage investments. He should therefore be able to fence the land in order to exclude third parties.

The triumph of this bourgeois ideology reached its peak with the French Revolution, and became the ideal foundation of the new social order. Article 17 of the French Declaration of the Rights of Man and of the Citizen (1789) declared property to be “an inviolable and sacred right.” The adjective “sacred” is not to be taken lightly in the context of a Revolution which was, at its heart, atheistic. The French Bourgeoisie wanted to do away with the theological spirituality of the medieval age and build a new materialistic pantheon, one with property at its core. From the notion of a “sacred” property right derived the idea of an exclusive property right. If the relationship between the owner and her land is sacred, it is unacceptable for a third person to interfere, even simply by putting her foot on the land.

The individualistic path undertaken by the French, however, should not be seen as inevitable. The ideas of Rousseau, for instance, had won over many admirers in the revolutionary quarters. Robespierre himself proposed to allow everyone to hunt freely everywhere. He reasoned that hunting had been an aristocratic privilege and that it should now be opened up to the public. The

proposal was rejected by the majority of the Assembly, precisely to preserve the exclusive nature of the right of property. Hunting, as any other activity, required the owner's authorization.

These individualistic ideals were injected into the Civil Code, which should be regarded not simply as a statute whose function is to organize the economic relationships between private parties, but also as a document that embodies the values and the aspirations of the new post-revolutionary society. As such, the Civil Code should be thought of as a quasi-constitutional document.

In the following years, the virtues of the Civil Code were celebrated by the so-called "école de l'exégèse," the dominant legal school of thought in France during the 19th century. The school believed that a legal scholar had no other role than to explain the content of the Code, without being influenced by external sources or by his personal inclinations. These scholars became the priests of the new legal order and they did not lose any opportunity to idealize, almost with religious fervor, the virtues of ownership and the good moral qualities of the owners, who were described as the cornerstones of French society.

We can now turn our focus to the United States – a particularly interesting jurisdiction for the study of the relationship between political ideology and property, as well as its consequences for the right to exclude. The American Revolution was dominated by liberal and republican philosophical theories about property. While the former convinced the founding fathers of the moral virtues of ownership and the role of the state as a protector of property, the latter justified state regulation for the common good. It would, however, be a gross oversimplification to reduce, as has often been done, the evolution of property rights in the first years of the Union to a battle between two abstract ideals. In fact, a very important contribution came not from a philosopher but from a lawyer, William Blackstone, whose Commentaries became a bridge between the English common law and the American legal system.

Historically, the most significant debate in the United States about property has concerned the limitations that the legislature can impose on land owners in order to advance the public interest. Scarce attention has been paid to the more specific subject of the land owner's right to exclude. In fact, in the first years after the Revolution, most of American states departed from the English tradition in many respects. For instance, the so-called "fence in" rule under English law places the burden to close grazing land on stockbreeders. Hence, the breeders are held responsible for the damages caused by their cattle on unfenced private land. In contrast, because of the huge amount of free pastures in America, most states applied the opposite rule, the so called "free-range" rule, which puts the burden to fence their land on land owners who want to keep animals away.

The departure of American law from English common law during the first years of the Federation did not, however, pertain solely to rights of pasture. Several states recognized, for instance, the right of the public to hunt on private land that was unfenced and uncultivated. The rule was expressed very clearly in the South Carolina Supreme Court decision in *M'Conico v. Singleton* (1818) according to which: "The right to hunt on unenclosed and uncultivated lands (...) has never been disputed, and (...) has been universally exercised from the first settlement of the country up to the present time". The same rule was enshrined in the Constitutions of Vermont (1777) and Pennsylvania (1776). These rights were of customary origins. They made their way into state law and even into the constitutions originating from popular traditions. This phenomenon can be understood in the context of the poor origins of many Americans who had witnessed the enclosure movement in England and considered it a social injustice. In this sense, the notion of liberty itself, far from overlapping with a strict defence of property rights, as one would expect in a liberal tradition such as that predicated by the intellectual elite, incorporated the freedom to hunt and gather certain resources on unfenced and uncultivated land. Eventually, however, these customary rights were suffocated by the federal courts. For instance, a known admirer of the English common law such as Oliver Wendell Holmes, writing for a majority of the Court in *McKee v. Gratz* (1922), while recognizing the departure of American property law, insisted that hunting and fishing on another person's land could not be considered a right, as it relied on an implicit licence that the owner could withdraw whenever she saw fit to do so. This line of thought by the federal courts has generated a theory of "American enclosure," much less studied and analyzed than its English counterpart.

The reasons behind the success of the common law over customary rights can probably be attributed to the intellectual prestige that surrounded the common law and to the cultural distance between the state courts and the federal courts in the first years of the Federation. While federal judges had generally received a good legal education, and were well versed in the study of Blackstone's Commentaries, the same was not true for state court judges who, unsurprisingly, preferred to rely on their own social sensibility, which included an acceptance of customary law. This personal element of jurisprudence, however, faded away when the legal education of state judges started to become more formalized and paralleled that of federal judges.

The different ideological positions that I have examined in the 19th century ultimately converged into one position: the celebration of an individualistic and exclusive property right as the only legitimate way of regulating economic relationships. This idea was the very base upon which the bourgeoisie ideology

rested and it was jealously guarded against any possible attack, especially from the emerging socialist political parties. This ideological bias had severe consequences not only for the property rules themselves, but also for the way the phenomenon was studied and analyzed. Exclusivity, perceived as the backbone of private property, was strenuously defended as “natural,” while all alternatives were rejected with intellectual disgust. The complex legal heritage of the medieval ages, which included common rights on the land, was regarded as nothing more than a barbaric remnant of dark times.

These views, however, in the second half of the 19th century were defied by a very small, but culturally influential, group of intellectuals. Among them the most interesting was Sir Henry Sumner Maine, who in 1861 published “Ancient Law”, his most famous work. Maine walked a new methodological path, in many ways anticipating both comparative law and legal anthropology. He conferred the same dignity to exotic legal systems, such as Hindu law, as to the noble and prestigious Roman law. His intent was to show that most of the theories generated by natural law philosophers, among other things in the field of property, rested on false premises. According to enlightenment theorists, starting with Locke, private property had begun with an individual who, at the dawn of time, had isolated a portion of the world and made it his own. Having studied Indian culture, Maine was convinced that, at the origins of humanity, there were no individuals as such, but rather groups, tribes and families, from which he concluded that property rights were fundamentally collective in nature.

Another very significant thinker of the time was the Belgian economist Émile De Laveleye. His work, “De la Propriété et de Ses Formes Primitives” (1874), was less intellectually complex than that of Maine, but was very well known across the whole of Europe. Laveleye essentially embraced Maine’s findings but, unlike him, did not focus on a wide historical and cultural critique, preferring to address the issue from an ethical point of view. For Laveleye, a devoted Christian, collective property was superior to individual property for its social value. While both Maine and Laveleye tended to oversimplify and generalize too much, their real importance was that they brought into question many of the accepted truths of their time.

Chapter III - The Emergence of the Right of Access to Nature

Chapter III shows how a welcoming attitude towards access to nature has gradually emerged, even in those countries which have traditionally safeguarded the owner’s right to exclude.

At the end of the 19th century, London's huge population started to demand green spaces where it could relax and engage in open-air activities. Nature started to be perceived as a place suited to recreation and leisure, and not only as an object of commercial exploitation or exclusive enjoyment by private owners. The first consequence of this new trend was the halting of enclosures. The second was a harsh political battle for the so-called "right to roam," the right to wander on private land in order to enjoy nature.

During the 20th century, the English parliament, under the pressure of groups such as the Ramblers' Association, issued many statutes, like the Access to Mountains Act 1939, the Access to the Countryside Act 1949 and the Wildlife and Countryside Act 1981, in order to enhance the availability of open spaces. These acts were somewhat modest in scope, as they did not envision a full-blown "right to roam." However, the situation changed in 2000, when the Countryside and Rights of Way Act (CRWA) was enacted, which opened large portions of English open land to the public. The CRWA allows the public to enter onto certain types of private land as long as the land is not damaged and nothing is taken away (not even berries or mushrooms). This, as we shall see, is significantly different from the rights that flow from the Swedish and Norwegian "allemansrätt." An even more interesting difference is that access to private land is never allowed for commercial purposes. This means that a tourist agency cannot organize a trip on private land. This rule can probably be traced back to the old mentality according to which property is "sacred" and only the owner is allowed to earn money from it.

In continental Europe, the "bourgeois ideology" seemed to crumble during the 20th century, especially after the enactment of Constitutions, like Italy's, that explicitly protected the "social function" of property. A careful observer can now identify two competing forces in these legal systems. One preoccupied with defending the traditional notion of a very strong right to exclude, the other pushing for wider access to nature. This tension makes itself evident in many ways. On one hand, the Italian Supreme Court of Cassation declared that the right to exclude is an essential element of property. As such it cannot be dismissed. On the other, the very same Court has recognized since the second half of the 19th century the possibility for the public to obtain a sort of collective and perpetual easement over private land. After 20 years of peaceful use by the community, the owner loses her right to exclude. The same dichotomy exists in Italian legislation. Article 841 of the Italian Civil Code guarantees the right of the landowner to fence the land. However, many counties in the Alps, through administrative provisions, have prohibited the owners from fencing in a way that would be a hindrance to skiers during the snow season. In other words, a

landowner has to accept skiers on her land. In France, the legislature has enhanced the public's access over private land to public beaches, and provided very restrictive conditions for compensating the land owner for the public's access. Damages have to be "direct, materiel et certain" before a land owner may so claim. (Code de l'Urbanisme Article L160-7).

Chapter IV - The Customary Origins of the Allemansrätt in Sweden: an Invented Tradition?

In Chapter IV the origins of the Swedish "Allemansrätt" are examined. The allemansrätt is a legal institution according to which the public can enter onto private land in order to take a walk, stay there for a limited time and even pick a few wild flowers, mushrooms or berries. The allemansrätt is not regulated by any statute, but its limits can be indirectly inferred from various provisions. Of particular relevance are Chapter 12 § 2 and Chapter 12 § 4 of the Swedish Criminal Code (brottsbalken). The first provision lists the natural resources that a passer-by cannot take (such as, for instance, grass and trees). He can, however, by *e contrario* interpretation take a reasonable amount of unlisted resources. The second provision prohibits passers-by from entering without permission on farmed land, on other types of land which are prone to be damaged, or on the "tomt," a term that indicates the area (whose extension is not defined with precision) which surrounds the home. Access to other areas is, again by *e contrario* interpretation, allowed.

Most accounts of the allemansrätt mention its medieval origins. However, the term itself is merely one hundred years old and can be found for the first time in an 1899 book by Adolf Åström about water rights. It was thereafter employed in the travaux préparatoires to the 1918 Water Act and then used by Östen Undén in his real property book, published in 1936. Finally, the term was brought to public attention by court of appeals judge Gunnar Carlesjö, who dedicated a paper to the allemansrätt that was attached to the final report issued by the state enquiry commission about open air activities (1940). Carlesjö declared with confidence the existence in Sweden of the right for the public to enter onto private land and described its main features. The question arises, is the allemansrätt an ancient institution or, as some have thought, a modern one to which a more noble and ancient tradition has been attached for political reasons? To answer this question, it is necessary to explore Swedish legal history with particular reference to the right of property.

Interestingly, Swedish legal history is characterized by a relatively low level of social conflicts revolving around land ownership, especially in comparison with the continuous disorders in France and England. This phenomenon has been explained by the low density of population in Sweden, which has kept the economic pressure on the land low. While this element has, to be sure, played an important role, other factors, pertaining to Swedish political organization and culture, should not be forgotten. Among them, the most relevant is certainly the absence in Swedish history of a feudal organization similar to the ones in England and France. Only in the 17th century did the Swedish aristocracy try to import the “double domain” theory from the continent in order to justify its superiority. This attempt, in the long run, proved to be a failure. In fact, according to reliable estimates, at the peak of its power the aristocracy owned no more than 40 percent of the land, while the peasants (in particular the so-called “tax peasants,” the “skattebönder”) owned another 40 percent and the Crown a mere 20 percent.

More importantly, the Swedish peasants were represented in parliament and participated in the political debate. While a certain amount of social tension emerged because of aristocratic pressures, such tension very seldom rose to the level of open revolt. Instead, it was typically expressed through institutional channels. For example, in 1789 Gustaf III managed to obtain absolute powers thanks to the support of the peasantry. In exchange, the peasants’ land ownership was officially declared to have the same legal status as that of the aristocrats.

In the absence of a high level of social tension surrounding land disputes, property was not a central theme of the Swedish political discourse. Moreover, the bourgeoisie, the social class that in France and England was truly concerned with the protection of property, emerged in Sweden as a strong political force too late to influence the core of the legal system. In fact, while the French Civil Code was a clear turning point in French legal history, a symbol of the new bourgeois social order, the main Swedish normative corpus, the Sveriges Rikes Lag (1734), as is typical within the whole Nordic legal family, is the continuation of a very long legislative tradition dating back to the provincial laws in the 12th-13th century. Unsurprisingly the Sveriges Rikes Lag contains no definition of property that resembles Article 544 of the French Code Civil. In fact there is no definition at all. If we turn our attention to the constitutional documents, we notice the absence of emphatic expressions to describe the right of property. Property is never called “sacred,” nor is it imbued with moral or spiritual values. In the first half of the 20th century, a negative attitude against property was consolidated by the most internationally renowned Scandinavian legal movement, Scandinavian legal realism. The founding father of the movement,

Axel Hägerström, thought that it was very hard to link property to real facts and that the link between the owner and the object was little more than a magical abstraction.

What about the owner's right to exclude? If we read the medieval provincial laws, the 1350 Magnus Eriksson national law for the countryside and the 1734 Sveriges Rikes Lag, a clear pattern emerges. In all epochs, the owner has had the right to exclude third parties from her land only for two basic reasons: the protection of the land's economic value (prohibiting entry onto cultivated fields or to pick certain valuable products) and for her own privacy (prohibition to enter the so-called "tomt"). She has never had the right to exclude third parties from areas where they could not cause any substantial damage; and never had the right to exclude for other reasons.

What we today call allemansrätt was, in fact, a sort of legal leftover used by people in the countryside, especially the poor, to enter onto private land in order to pick berries or mushrooms. This habit was resisted by land owners at the end of the 19th century when the values of berries, and in particular of lingonberries, grew. The legislature, however, chose to not deprive the poor of an important resource and refused to explicitly prohibit the public from picking berries on private land. In the 20th century, this vacuum in the legislation, this sort of grey area that until 1899 had no name, started to be actively supported by the social-democratic governments as a way to enhance access to open-air activities for the public. This idea fitted neatly into the redistributive social program of the social-democratic party.

The Swedish legislature, however, has refused comprehensively to regulate the allemansrätt, fearing that a legislative definition would have the undesired effect of drawing a sharp and rigid line around the activities that the public is allowed to undertake on private land, and so preventing the expansion of access to nature. The allemansrätt has nonetheless been mentioned in several statutes concerned with the exercise of open-air activities. It has for instance been cited in the travaux préparatoires to the 1952 Beach Act (strandlagen) and in § 17 of the 1964 Environmental Protection Act (naturvårdslagen) (now chapter 26 § 11 of the 1998 Environmental Code), which allows the public administration to order an owner to remove a fence which closes off an area of particular interest to the public, thus providing the public with access to nature. Most importantly, in 1994, the allemansrätt has been mentioned in a constitutional provision, chapter 2 § 18 of the Form of Government. The provision was amended in order to reinforce the protection of property rights in Sweden. The legislature, however, has explicitly safeguarded the population's open-air activities declaring that

“there shall be access for all to the natural environment in accordance with the allemansrätt, notwithstanding the above provisions.”

We can now answer the opening question about the origins of the allemansrätt by replying that this institution, in its modern sense (as a means to make nature available for everybody), is a relatively recent phenomenon. It is, however, founded on the “weak” property model that is deeply ingrained in the Swedish legal culture.

Chapter V – Allemansrätt: Practical Issues

Chapter V describes in greater detail the specific rules pertaining to the allemansrätt, with respect both to access onto land and to the gathering of certain products (such as wild flowers or berries). In particular, it focuses on the notion of “tomt,” the area surrounding the home from which the public is excluded, and on the extent to which the owner is forced to tolerate minor damage to her land.

The Chapter also analyzes two problems that are typical of the allemansrätt: the so-called “mass invasion,” when many persons enter onto private land at the same time, and the commercial exploitation of the allemansrätt.

As for the mass invasion problem, a basic distinction should be made between situations where someone has induced people to gather onto a certain tract of land and situations where the “invasion” is entirely spontaneous. In the first case, the landowner can eventually recover damages from the so called “kanalisatör,” the person who has induced others to gather on the land. In the latter, recovering damages is extremely hard, as the damage to the land is often caused by the sheer mass of people walking on it, and not by the unlawful behavior of any specific individual that could be held accountable.

The commercial exploitation of the allemansrätt has been dealt with by the Supreme Court (NJA 1996 p. 495) which has decided that nothing prohibits an individual or a company from profiting from the allemansrätt, as long as the owner does not suffer unreasonable damage.

Finally, I argue that ownership and allemansrätt are now in Sweden two opposite poles in the relationship between persons and land. As has been suggested by Swedish scholars, the two institutions share some interesting features, like the so called ‘elasticity of property’, which in fact belongs to the allemansrätt as well. Moreover, although both the ownership and the allemansrätt are protected by the Constitution, neither of them is precisely defined by a statute. Finally, both have very clear, but opposite, ideological underpinnings.

Chapter VI – The Allemansrett in Norway

Chapter VI describes the Norwegian allemansrett comparing it to its Swedish counterpart.

The two traditions departed from each other in mid-twentieth century, when the Norwegian legislature decided explicitly to regulate the allemansrett. There were many reasons for the regulations. In particular, the Norwegian government was worried by the increasing number of people who desired to vacation on the coasts, and by the purchase of large amounts of land in coastal areas by private landlords. A clash of these two interests seemed inevitable and it was believed that the courts were ill-equipped to deal with it efficiently.

The 1957 statute about open-air activities (Friluftsløven), while regulating the allemansrett, contains many flexible provisions. The legislature feared that detailed regulation would have suffocated the regional customary differences that are typical of the allemansrett. The flexibility of most provisions has also allowed the courts to continue the gradual expansion of rights of access to nature without further intervention by the legislator.

The Norwegian approach seems in many ways more desirable than the Swedish, as the 1957 Friluftsløven has solved many of the ambiguities that currently characterize the allemansrätt in Sweden without weakening access to nature.

Chapter VII – Closing Remarks

The time is ripe to make a prediction about the future of the two models that have been analyzed in this book.

The “strong” property model is clearly undergoing a major transformation. The clearest sign of this trend is the English Countryside and Rights of Way Act 2000. Less obvious, but still meaningful, changes can be observed in France and Italy, where the right to exclude, at least in its extreme version, seems more and more detached from the legal consciousness of society. As a result, these countries are gradually recognizing more opportunities for the public to enter onto private land in order to engage in specific open-air activities. At the same time, the allemansrätt in Sweden and Norway seems to be growing stronger.

Considering this converging trend, the study of the Nordic tradition offers to the Italian jurist a much needed opportunity for reflection. It would certainly be unrealistic and even naive to imagine the possibility of transplanting the

allemannsrätt in Italy. The Scandinavian experience can nonetheless be used as a point of departure to conceptualize and organize the many different routes to access to nature which nowadays are emerging in a rather haphazard fashion. The right of access to nature is today a sort of “penumbra right” that needs to be brought to the centre. While the balance between the interests of the public and those of the owners is bound to be different in Italy as compared with Sweden or Norway, for instance because of different geographical conditions, it is unacceptable to leave such an important matter – fraught with consequences for the quality of life, for economic development and for environmental protection – to a limbo of non-law or, with identical or even worse results, to a chaotic proliferation of minute statutory and administrative provisions.