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# The Properties of Property[1]

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*The most serious single source of misunderstanding of the concepts of alien cultures is inadequate mastery of the concepts of one's own culture (Finnegan and Horton, quoted in Hirschon 1984: 2).*

## Introduction

Property is in. The media follows debates about patenting food crops and the human genome while protesters around the world reject neoliberal privatization. Academics and policy theorists tout various property forms while the market turns ever more things into commodities. Throughout history, property has been at the centre of such intellectual, economic and political struggles. But a number of recent developments force us to take a renewed look at property. One is the rapid increase in new types of properties, including social security rights, tradable environmental allowances, bioinformatics, cultural property and even such ephemeral things as air. Another development is the changing constellations of property relationships that form network-like structures sometimes reaching around the globe. These developments touch on fundamental issues of identity, social organisation and governance that have wide implications. They have also put classical property categories under increasing strain.

But to focus on property immediately entangles one in a long history of deeply intertwined conceptual discussions, social philosophies and ideological justifications of past, present and future property regimes. This is not surprising as property concerns the organisation and legitimation of rights and obligations with respect to goods that are regarded as valuable. Property is thus the legitimate cloth of wealth as property systems structure the ways in which wealth can be acquired, used and transferred. Property is of central importance in all economies, but it cannot be reduced to 'the economic'. Property is always multifunctional. It is a major factor in constituting the identity of individuals and groups. Through inheritance, it also structures the continuity of such groups. It can have important religious connotations. And it is a vital element in the political organisation of society, the legitimate command over wealth being an important source of political power over people and their labour, no matter whether we think of domestic or kinship modes of production, capitalism or communism. Property regimes, in short, cannot easily be captured in one-dimensional political, economic or legal models.

[1] This paper began as the background paper for an international conference on 'The Properties of Property', held at the Max Planck Institute for Social Anthropology, Halle, 2-4 July 2003. The title was inspired by Bob Hunt's essay 'Properties of Property: Conceptual Issues' (Hunt 1998). We thank Brian Donahoe and Chris Hann for their thoughtful comments. With a few changes, it will become the ontroduction of F. and K. von Benda-Beckmann and M. Wiber eds. 2006 The property of properties. London: Berghahn.



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Property is the focus of struggles at all levels of social organisation, within and between families, communities, classes and states. The distribution of property objects has been contested throughout history, as have the legal property regimes themselves. Ruling elites have put much energy into regulating and changing property regimes in support of such variable objectives as accumulation of wealth for their own benefit, a public good such as equity, the efficient use of scarce resources, or the protection of the environment. And ordinary people have always had their own objectives, and their own corresponding views on how property should be organised.

As a result, property regimes and property rights have been a central theme historically in law and philosophy. More recently, they have also become central to many other disciplines including sociology, anthropology, law, political science, economics, geography and human ecology. Property figures as a prime mover in such diverse topics as social evolution, modernization, globalization, human rights, civil society, and sustainable resource management. Given this instrumental importance, many theories focus less on accurate descriptions and explanations of existing property regimes and more on desired (just, efficient) states of ideal property relationships, more with how property regimes *should* be instead of how they are (Reeve 1991: 111). One result is that property models that purport to be universal are in fact largely based on western legal categories, the most important of these being the notion of private individual ownership, often regarded as the apex of legal and economic evolution as well as a precondition for efficient market economies. This has led to a misunderstanding of property both in Third World societies and in western industrialised states, encouraging property policies that have unintended and deleterious consequences.

As a result, property as a concept has become loaded down with a heavy freight of political and ideological baggage. This can be redressed by returning to earlier foundations such as the metaphor of 'property as a bundle of rights', which while useful, has rarely been used consistently. We demonstrate how to take the 'bundle of rights' seriously in order to capture the different roles that property may play, as well as the complexities and manifold variations of property in different societies and in different periods of history. We also incorporate the several distinct analytical layers at which property manifests itself, in ideologies, in legal systems, in actual social relationships, in social practices, and pay attention to the interrelations between these phenomena. What property is at these different layers may vary significantly and this variability cannot be reduced by collapsing one layer into another. Finally, we think it vital to address the fact that many contemporary states have a plurality of property ideologies and legal institutions, often rooted in different sources of legitimacy, including local or traditional law, the official legal system of the state, international and transnational law, and religious legal orders.

In what follows, we illustrate the importance of such an analytical framework for more accurate descriptions of the way property operates in the real world. These empirical descriptions in turn are a precondition for theorizing about the place of property under conditions of social, economic and ecological change. While policy advice is not one of our objectives here, many studies have shown how past policies centered on the desirability of highly theoretical property regimes have failed. And given the recent developments alluded to earlier, we see the need for an analytically rigorous framework if such costly failures are not to be repeated. With technological and bio-physical innovations, and with increasing government



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**Deleted:** In this introduction, we refer to the individual contributions in the volume to unpack much of this freight. The volume as a whole also explores how the analysis of property regimes has been hampered by the lack of any sufficiently rigorous analytical framework.

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involvement in managing productive resources, new valuables have been created that were unthinkable until recently. These new properties raise new political, legal and ethical questions, and generate new conflicts. More importantly, they stretch the bounds of property categories, allowing us to study property concepts as they transform. This is particularly useful to order to counter the widespread tendency to think of property in terms of universal types (private, state, communal, open access) that are supposedly found widely distributed across space and time. As we will show, one of the strengths of our analytical framework is in investigating to what extent these new properties are indeed new and whether they force us to rework our property categories.

In the following section of this paper we turn to the property freight we wish to unpack, including the ways that different disciplines have theorized property, and the interactions between disciplines that have continued to add to the theoretical baggage. Some of this baggage is well worth retaining, while much should be jettisoned. We then go on in subsequent sections to outline and illustrate the elements of our analytical framework before returning at last to the issue of new (and old) forms of property.

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## Unpacking the Freight

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We cannot examine in detail the conceptual baggage built up over several hundred years of academic theorizing and carried over into any new analysis of property. But it is useful to highlight some important developments in particular disciplines, and the subsequent interactions between disciplinary approaches, in order to better understand some of the misunderstandings that have taken root. Such a survey also suggests several ways in which property analysis needs strengthening.

### *Viewing Property from Different Disciplinary Perspectives*

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Contemporary property theory implicitly or explicitly relies on political economists such as Locke, Rousseau, Engels, Marx, Adam Smith and others, who taken together unfortunately generate many complex and contradictory views of property. Political scientists mine these particular theoretical lodes to address a spectrum of issues, including: the sources of legitimate property rights, the role of the state in protecting and distributing property rights, the role of property in delineating sovereignty, social justice and equity, and in shaping the relationship between the individual and the state. A significant contribution here has been the focus on the relationship between power and property, but unfortunately the tendency has been to resolve this important issue through the simple expedience of viewing the state as the sole legitimate font of property rights. This argument came to underpin much economic thinking (Demsetz 1967; North 1981).

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The balance between the rights and freedoms for individual persons and the needs of the collective of which they are a part has proven another enduring question in political science. Over time, different societies have arrived at quite different solutions for this balance and every legal system (including their property aspects) is a reflection of the political arrangements under which this ongoing balance is negotiated. The many quite different histories of property relations in various places around the world fall into broad patterns that have been labeled feudalism, capitalism, or socialism. But they all illustrate quite different ruptures and continuities, particularly in the distinction between what is

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public and what is private, but also regarding the question of how (private) individuals may influence political decisions that affect entire groups (the public). Such political debates tend to create a public/private dichotomy, despite the fact that both have multiple and overlapping meanings (Weintraub 1997; Geisler 2000).[2] Wiber (2006) explores the way these several meanings are selectively applied in debates surrounding cultural property claims and illustrates the way that the apparently simple dichotomy depoliticizes highly unequal power struggles in two cases from North America, one involving a religious artefact and another involving ancient human remains. She shows how repoliticizing the public/private divide allows us to track the many political processes that make one set of claimants more persuasive than another. Recognizing these different distinctions of public and private and their defining criteria (Weintraub 1997: 27, 37) allows us to expose the many and contradictory ways that these terms are used in political and legal thought.

Legal science, sharing many interests with political philosophy, has also viewed property as central to the sovereign state, law and governance, thus arriving at a similar distinction between public and private. In European and American legal systems, this distinction is largely derived from viewing the 'public' as closely linked with governance, and with relations of legitimate control and coercion by political representatives of the collectivity (public). On the other side lie the voluntary, equal, uncoerced, contractual relationships (private) as epitomized by 'the market'. The 'public' or 'private' character of rights has thus largely been determined by the difference between public and private law.[3] In European law, the legal status of the property object gives the public or private stamp to the associated rights. The property holder may be a public body yet the status of the object may make it private property, with the public body then treated as a private property owner, subject to the sphere of private property law. On the other hand, individual citizens may have quite specific rights in property defined as public. Carol Rose (1994: 117) finds it helpful to distinguish two types of public property. The first is property 'owned' by the state as in government buildings, military supplies, or ministerial jets. The second is property owned collectively by the 'unorganized public' such as state forests or territorial waters, with claims independent of and perhaps superior to the claims of any purported governmental manager (ibid: 110). Such porous barriers between public and private can lead to significant conflict between state and citizens, as Sikor (2006) illustrates. Public (environmental) and private (agricultural) values come into conflict in some post-socialist societies, when the owners of newly-restored private farms resist the effort of the state to download the cost of environmental reform onto them. In such cases, depoliticized notions of public and private do not further our understanding of the property aspects of these conflicts.

The practical and applied objective of legal science, meanwhile, is to create institutions and rules that defuse or manage such conflict. In this vein, the bundle of rights metaphor can help to identify the many possible interests associated with a single valuable (Maine 1861; Hohfeld 1923). Legal theory also addresses the question of the sort of social actors that should hold property rights and the relationship that should pertain between

[2] See also F. von Benda-Beckmann (2000); Goodall (1990); N. Rose (1987).

[3] Public law constitutes state institutions and regulates their relationships, as well as the relationships with non-state organisations and individual persons in their legal status as citizens. Private law pertains to the legal status of and the relations among citizens.

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multiple holders of rights in a single good. A recent example of this problem is explored by Pálsson (2006) with respect to the corporate appropriation of Icelandic family trees and genealogical information in the age of genome patents and genetic pharmaceutical/nation state partnerships. Who should own the genetic material we carry in our bodies, and in the Icelandic case, who should own the medical records that make possible the interpretation of the importance of selected genes? In bridging the different ways of conceptualizing such problems, across both cultural and national boundaries, comparative scholars and legal practitioners have developed innovative property concepts (such as intellectual property) and have sought to make different kinds of property rights compatible in a practical way (Arthurs 1997; Dezalay and Garth 1995; C. Rose 2003).

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In dealing with similar problems of comparison across different cultures and societies, classical anthropological theorists such as Maine and Morgan naturalized variation by adopting an evolutionary framework. Property as an institution was said to have evolved from types that privileged group rights to types that privileged individual rights (Newman 1983). When classical social evolution was later rejected in favor of more empirical and descriptive micro-theory, functionalist thinking and later neo-functionalist approaches such as ecological anthropology, both treated property as an integral part of a wider systemic whole. In more recent scholarship, the notion of systemic interdependencies (often expressed as 'embeddedness') has been pursued through empirical studies of how property systems work on the ground. This empirical focus has been a particular strength in anthropology, documenting the role of kinship in property management, examining situations of legal pluralism,[4] problematizing the state as holder of superior rights in all property, and generally deconstructing many western assumptions.[5]

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Much of this material was overlooked when the discipline of economics began to seriously theorize questions of property. Here the main focus has been on the theoretical significance of property in managing the social and economic effects of scarcity so that human needs can be efficiently satisfied. Maximisation of scarce resources is optimized where institutions clarify and regularize access to resources (Demsetz 1967; Barzel 1989; Libecap 1989, 1990). Property types are thus evaluated according to how they further this end with the result that economists distinguish what F. von Benda-Beckmann (2001: 296) calls the 'Big Four' theoretically significant types of property. Open access, a form of non-property, is the most ambiguous and thus the least desirable situation. Common property is only viable where there is a well-defined set of individuals with well-defined rights in the collective property, and where rules exist for regulating access and controlling for externalities.[6] State property is necessary where a powerful centralized agency is required

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[4] Surveys of the concept of legal pluralism include F. von Benda-Beckmann (2002); K. von Benda-Beckmann (2001); Griffiths (2002); Merry (1988).

[5] See among others F. von Benda-Beckmann (1979); F. and K. von Benda-Beckmann (1994); Allott et al (1969); Gluckman (1972, 1973); Goody (1962); Hann (1998, 2003); Hunt and Gilman (1998); Juul and Lund (2002); Leach (1961); Van Meijl and F. von Benda-Beckmann (1999); Spiertz and Wiber (1996); Verderey (2004); Wiber (1993).

[6] The commons literature is enormous but a good start is McCay and Acheson (1987); Cole (2002); Ostrom (1990); Ostrom et al. (2002). Recent contributions to adaptive management of the commons can be found in Dietz et al. (2003); Gunderson and Holling (2002); Hanna et al.

to control otherwise unlimited access and withdrawal, as in marine fisheries.[7] But only private property, with clear identification of an owner and a full set of rights that include transmissibility will facilitate the gathering up of resources into the hands of the most efficient users (Barzel 1989: 7; Libecap 1989: 10). The central economic institution, the market, is the prime mover in this process. Thus, anything other than individual private ownership is regarded as inefficient, lacking the full specificity, legal security, and freedom of transfer that is considered fundamental to economic growth.

### *Cherry Picking and False Comparisons*

To properly engage with such recent developments as the global push for privatization, one must grapple with the intellectual freight discussed above. While each of these disciplinary traditions has made important contributions to the understanding of property, they have also been limited by their particular focus. Many property theorists have been aware of this drawback and have striven to develop a cross disciplinary perspective on property. However, an additional problem has then developed as a result of scholars cherry picking very specific notions, lifting them from one disciplinary context and using them elsewhere. The result has often been over simplified property models, often based on conceptual misunderstandings and false comparisons, which in turn have been particularly damaging in the development and implementation of property policy.

Broadly speaking, property scholarship can be divided into two main approaches: the instrumental, normative and teleological on the one hand, and the empirical, descriptive and analytical on the other.[8] Particularly among the instrumental and policy driven approaches in law, economics and ecology, there has been a recent escalation of selective borrowing between disciplines. For example, the economics and property school drew on outmoded ethnographic studies to theorize about the evolution of property forms (Demsetz 1967). Law and development scholars and development economists borrowed from each other to advocate the transplant of western property institutions into developing nations (see Johnson 2004), and to subsequently explain the poor success rate of such transplants. Ecological property theory more recently has been incorporated into economic models, while a reciprocal interest in economic property theory among ecologists has been fueled by issues of natural resource management.[9] Ecologists have also dipped into ethnography in order to speculate about how property systems may have evolved to deal with certain kinds of resource constraints.[10] Such mixing and mingling of ideas, including cultural

(1996). For a critical review of the applied work of the 'commons professional', see Goldman (1998).

[7] Some economists advocate private property rights even in the fisheries. For a list of citations and a critique of this position, see Wiber (2000).

[8] Of course, social actors pursue many different and often quite contradictory objectives. To simplify our discussion, we reduce this diversity to a single distinction between instrumental and purely academic interests in property.

[9] One can track such borrowing through the expansion of cross disciplinary journals such as *Natural Resource Economics and Policy*, *European Journal of Law and Economics*, and *Ecological Economics*. See also Constanza and Folke (1996); Taylor (1998).

[10] The 'Big Four' were fundamental to the analysis by Schlager and Ostrom (1992) and Ostrom and Schlager (1996) that subsequently shaped common property studies (see Berkes 1996: 89;

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evolution, self-organisation in complex systems, rational choice theory, new institutional economics, the new norms literature, and chaos theory (see C. Rose 1999), eliminates a great deal of disciplinary context in order to sustain a positivist, methodological individualism and formal modelling (Johnson 2004: 409). While such modeling may facilitate the development of broad property policy direction, it may also explain why much of this policy fails in its objectives. One example of the resulting theoretical shortcomings can be illustrated through a discussion of property and ownership.

Instrumental theories and resulting policy are based on implicit or explicit assumptions about property that are empirically false for both western and non-western legal systems and societies. The most serious misconception lies in the area of private, individual ownership, which narrowly conceived, glosses over the many different kinds of rights and sets of obligations that can be involved both with respect to different categories of objects, and of categories of property holders. To illustrate some of the existing complexity here, both across time and space, we will return to the bundle of rights metaphor below. But first we want to draw attention to the way that much theory reifies the individual as an actor, granting owners far more agency than they have in real life. Examples are found in rational choice theory and in notions of absolute ownership (C. Rose 1998). Such ethnocentric (and erroneous) notions of free agency with respect to owned property are then taken to be the ideal to which all property systems should aspire, in both western and non-western legal systems.

In fact, rights are always political and frequently re-negotiated, and the terms of those negotiations are widely diverse across time and space. Schlager (2006) for example, examines water right holders along the South Platte River in Colorado and their unique problems given the demands of an arid environment and of surface versus groundwater uses. In this context, water rights concepts imported from less arid regions were untenable, and many political compromises were developed over time that constrained both individual and public holders of water rights. Nuijten (2006) provides another example from Mexico where after recent constitutional reforms communal *ejido* lands are now open to privatisation. Nuijten demonstrates how the many ongoing political negotiations between community members are more important to the changing patterns of production on the *ejido* commons than are property rights per se, and thus, few Mexican peasants are interested in the privatisation option.

In all state societies, the autonomy of owners with respect to their property has been increasingly limited under expanding public legal regulation of rights. The arguments for these limitations change over time, but have included: the common good, sound economic growth, protection of public environmental values, historic conservation, land use planning, or sustainable resource management. For example, European farmers of the past could place as many animals on their land as they could afford, but there are now serious limitations placed on land-animal ratios under either national or European law. Community or state permission is increasingly required for any change in the use or transfer of owned lands, forests, or waters, and in some cases, owners have discovered heavy sanctions for taking actions that they were formerly allowed. Thus, while many rights that were

Berkes 1999; Richards 2002). Frank Muttenzer (this volume) rejects many of Schlager and Ostrom's core assumptions in his analysis of community-based (mis)management of forests in Madagascar.



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unequivocally part of the ownership bundle in the nineteenth and early twentieth century have since disappeared or fallen under community or state control, the property object is still considered 'owned'. If the existing bundle of private property rights were to be measured against the mythical yardstick of 'total dominion', most European private ownership has never been ownership and is even further removed from ownership now.

Such errors have been compounded in interpreting the property systems of 'the other'. In many cases, the resulting misinterpretations have both academic and policy manifestations, with the two becoming inter-referential, taking on life in different circles and for different purposes. The colonial experience is a useful example of this as it allows us to briefly examine how such misunderstandings take on life of their own. Although the colonial academic and policy networks were separate and focused on quite different problems, they were mutually interdependent, giving academic legal comparisons wide political impact.

The main academic goal during colonial times was to describe and understand the strange cultures and socio-political organisation of other societies, and to translate and render them comprehensible to those at home. The major interpretative schemes of meaning such as private and communal ownership, usufruct, and the distinction between public and private domain, were taken from European legal systems. The application of these to non-western situations resulted in native concepts or institutions being viewed as more or less equivalent. Such assimilated concepts were then given the same legal and social consequences as the European concept had in European law. As the von Benda-Beckmanns (2006) describe, for example, the distinction between the public and private domain as defined in Dutch law was imposed on indigenous Indonesian property regimes that did not make this distinction in the same way. The colonial government, as the public authority, was then justified in deciding when a valuable was a public good and when the greater good superseded local rights. With respect to what the colonial authorities termed 'waste lands', the term right of avail or right of disposal (Dutch *beschikkingsrecht*) was introduced in order to emphasize that indigenous cultures shared with the Dutch a notion of public goods, which could be strengthened under the colonial system.[11]

In modern-day developing nations, a similar process makes it possible to constrain local rights in favor of nature conservation, mining, lumber concessions or resettlement in for example, the Indian Gir Forest, the Australian outback, or Indonesian and Philippine frontiers. The accompanying process of false comparisons has been criticized as 'backward translation' (Bohannan 1969: 410) or 'jamming into categories' (Nader 1965). It has seriously handicapped any understanding of and appreciation for other ways of organizing property. A generous interpretation is that this process results from the naive use of ethnocentric legal categories and leads to well-meaning state 'invention of customary law', which is ongoing in many post-colonial states.[12] A less generous interpretation might see such legal distortions as driven by overriding political and economic incentives to 'develop' resources in a way that benefits outsiders.

[11] See F. von Benda-Beckmann (1979); Holleman (1981: 43). Similar developments occurred in other colonies. These interpretations were later criticised as 'creations of customary law'. See Chanock (1985); Clammer (1973); Peters (2002).

[12] See McCarthy (2002); Povinelli (2002); Randeria (2003); Trigger (n.d.); Wiber (1993).

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Both interpretations may be too simple. Misinterpretations and false comparisons had two different types of consequences in colonial states. Western concepts were not only used as interpretative schemes of meaning but also as a standard for recognition under the state legal regime. In cases where local property rights were recognized within the administrative and judicial realm of the colonial state, the legal distortions did not have immediate consequences, although they sometimes affected and legitimized long-term changes in the distribution and inheritance of property and wealth within local social groups. But when recognition was denied, as when a right was not thought to sufficiently resemble European conceptions of ownership, the consequences were grave indeed, as happened with the previously mentioned wastelands in the Dutch East Indies.

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Much academic effort has been devoted to understanding the consequences of such property restructuring, including Marx and Weber, and more recent work by law and development, modernization, land reform, common property, and economic and property theorists. And the resulting property theories continue to have significant economic and political consequences. Many academics, for example, are outspoken advocates of an 'appropriate' restructuring of property in relation to certain goals, such as individual freedom, a just distribution of wealth, or an efficient use of productive resources. Their ideas have sometimes guided or at least justified government policies, as when entire societal restructuring has occurred under capitalism or communism.

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Given the misconceptions upon which they are constructed, and despite the fact that they often gain a policy audience, it should not surprise us that idealized property models are not an accurate reflection of what we find in real life. Is our western terminology at fault? Does it continuously lead us astray? Should we do away altogether with the term property? There has been support for this position.[13] It is true that the western category 'property' led to ethnocentric bias and distortions when describing and analyzing other non-western property conceptualizations.[14] But we argue that the word property can be redefined as a general analytical category.[15] It may be difficult to distance oneself completely from ethnocentric understandings of certain terms, but it would be strange if a semantic determinism prevented anthropologists and other scholars from clarifying their concepts to reduce specific ideological content. In the following section, we develop the criteria for undertaking a cross-cultural, comparative analysis of property. Since such basic criteria must be capable of embracing a variety of empirical manifestations, they will inevitably be rather general. Only when these general criteria are in place, and the major

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[13] The notion of property *rights* is sometimes said to convey a selective and specifically western legal character to property relationships. Strathern (1999) has further argued that even the notion of *relationship* relies on a western distinction between subject and object, one perhaps foreign to the way that others conceptualise human beings and their interaction with the natural environment.

[14] For some, this is reason enough to drop the concept or to speak of property only as a specific folk category of the west. While Verdery (2004) and Verdery and Humphrey (2004) express the same doubts, they continue to use the concept.

[15] The problem of translation is ubiquitous, affecting concepts of economy, marriage, religion, household, and law. All these words have culturally specific meanings, all have been used and abused in evolutionist and ideological discourses and have had political instrumental uses. Yet they have remained central and useful concepts in scholarly analysis.

dimensions identified along which wide variation occurs, will it be possible to adequately address the potential role of property in social change and transformation.

## An Analytical Framework for the Analysis of Property

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Property in the most general sense concerns the ways in which the relations between society's members with respect to valuables are given form and significance. Such relations are comprised of three major elements that include: first, the social units (individuals, groups, lineages, corporations, states) that can hold property rights and obligations; second, the construction of valuables as property objects; and third, the different sets of rights and obligations social units can have with respect to such objects. All three are set into time and space.[16] Property in this analytical sense is not one specific type of right or relation such as ownership. It is a cover term that encompasses a wide variety of different arrangements, in different societies, and across different historical periods. The metaphor of a 'bundle of rights' has been used to conceptualize these arrangements, mostly in two ways: first to refer to the totality of property rights and duties as conceptualized in any one society and second, to refer to any specific form, such as ownership, which by itself can be thought of as a bundle.[17] It could also be used, as we will illustrate below, in two further ways. First, to characterize the specific rights bundled in one property object and second, to characterize the different kinds of property held by one social unit.

Empirically, property finds expression in a wide variety of social phenomena, in cultural ideals and ideologies, in legal institutions, in actual social relationships and in social practices. We call these sets of phenomena 'layers of social organisation'.[18] What property is at one layer cannot be reduced to what property is at another layer. They concern different kinds of social phenomena, just as marriage ideologies and legal rules about marriage are different from the actual relations between two married people and their daily interactions.

These layers are interrelated in manifold ways, and these interrelationships must also be part of the analysis. For example, social practices of various kinds create, maintain and change what property is, having differential effects at the level of ideologies, of legally institutionalized categorical property relations, and of concretized property relationships. We can broadly distinguish between two general types of such practices. The first are

[16] This approach builds on earlier work (F. von Benda-Beckmann 1979, 1995; F. and K. von Benda-Beckmann 1999).

[17] The bundle of rights metaphor in legal anthropology goes back to Maine's *Ancient law* (1986 [1861]) and his *Dissertations on early law and custom* (1883) and has been adopted by social and legal anthropologists for the analysis of legal institutions such as ownership or marriage. See for instance F. von Benda-Beckmann (1979); Gluckman (1972); Goody (1962); Hann (1998); Leach (1961); Verdery (2004); Wiber (1993). For more on the metaphor of the total rights bundle, see F. von Benda-Beckmann (1995); K. von Benda-Beckmann et al. (1997). See also Pospisil's formal analysis of Kapauku land and water tenure (1971: 273-339).

[18] References to the embedded nature of property usually emphasize the deeply intertwined nature of property (and of the economy in general) with wider social, religious and political institutions, but without specifying how these interconnections work out in daily life (see Verdery and Humphrey 2004; Peters, this volume).

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(inter)actions that deal primarily with *concrete* property objects, relationships, and rights, and that occur when people simply use, transfer, inherit or dispute a relationship with a property object. A second type of practices are those in which *categorical* property law and rights are reproduced and changed, and in which the nature of property law is explained, discussed or disputed in interaction settings such as courts, parliaments, universities, the mass media or local forums. Under conditions of legal pluralism,[19] these practices can include disputes over which body of law is relevant.

While elements of property relations at the different layers become interconnected in social practices, they have a sufficiently independent character to also warrant an examination of their independent characteristics. This is particularly useful to document and better understand the wide variation in property forms. Decades of highly detailed anthropological study have demonstrated the myriad ways in which the elements of property relations can vary across cultural boundaries.[20] And within each society, each layer of a property regime may change with different speed and for different reasons. Rather than employing a deductive approach that pins property down to one of these layers, we prefer a point of departure that is empirically-grounded, and that analytically delineates property relations within a field of social organisation.

In the following sections, we illustrate how this analytical framework allows one to identify the three major elements (social units, property objects and rights and responsibilities) of any particular property constellation, as well as how they are conceptualized as bundles of rights, at the level of the ideological, of the legal institutional, of the social relational, and of quotidian practice. Further, we illustrate the utility of such an approach when comparative analysis across cultural variation is undertaken. We then rely on the contributions in this volume to illustrate how this analytical framework better explains situations of transformation and of change, particularly as relates to new forms of property.

### *Categorical Property Relationships at the Legal-Institutional Layer*

Given the social, economic and political significance of valuables, property relationships are legally formalized to a high degree in most societies. The resulting legal-institutional forms provide a legitimizing and an organisational blueprint for property relationships, as well as a procedural and substantive repertoire to clarify problematic issues, notably disputes. At this layer, we call property relationships 'categorical'. This is to say that general categories of property relations are constructed by specifying property holders, property objects, and the rights and obligations attached to these. Legal-institutional categories spell out rules and procedures for the appropriation and transfer of rights. Examples would include normative expressions of property rights such as: 'the owner of a

[19] As mentioned above, in most contemporary states there are many, often contradictory legal orders where property objects, rights and obligations, property holders, acquisition and transfers are institutionalized in different and frequently contradictory ways. We give examples in the sections to follow.

[20] See F. von Benda-Beckmann (1979, 1995, 2000); F. and K. von Benda-Beckmann (1999); K. von Benda-Beckmann et al. (1997); Bohannan (1969); Goldschmidt (1966); Hann (1998); Hunt (1998); (Nader 1965, 1969); Wiber (1993).

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thing can dispose of it freely unless he does not violate the rights of others', or 'inherited lineage property can only be pawned under the following conditions: …'.

At this legal-institutional level, cross cultural variation ranges along a continuum of differentiation. Some basic principles may guide *ad hoc* decision making processes for dealing with property, or a large set of formal rules and procedures may become institutionalized. In highly institutionalized and differentiated legal orders, property relations are conceived of as a relatively isolated legal sub-field and are differentiated from such social or political relationships as family or political relations.[21] Many less differentiating legal orders, on the other hand, do not separate out property categories in the same way, but treat them as one aspect or 'strand' of many-stranded relationships, including kinship ties, property relations and relations of political authority. In Minangkabau, for instance, lineage membership, lineage leadership and property rights were (at least from the point of view of those external to the lineage) just different aspects of one social relationship (F. and K. von Benda-Beckmann 2006). Further, even in those cases of high differentiation, the systemic interrelation between property and other institutions is likely to have a significant impact. For example, property relations (as a legal subfield) may be structured by tax law, environmental law, family law, and corporate law, to name but a few. Moreover, property is typically linked with and made useful through a number of other institutions, including the market, transportation, education, and public health, among others.[22]

The bundle metaphor is useful in dissecting the different aspects of rights in such categorical property relationships. First, it helps to capture analytically the *total range of rights and obligations*, the potential totality of 'sticks' that can be bundled and distributed over different holders of rights and obligations. Such sticks not only refer to access to a valuable and to a variety of uses and benefits, but also to its management, the possibilities of transfer and inheritance, and the political or religious authority to regulate and to distribute. In most societies a major distinction is made between rights to regulate, supervise, represent in outside relations and allocate property on the one hand, and rights to use and exploit economically property objects on the other. Many current economic theories see the former set as superior and as inherently encompassing the latter.[23] Thus, all exploitation rights are derivative. In state legal systems, as we have mentioned, these issues are often addressed in terms of public and private law, but even there, significant overlap exists. In societies with less hierarchical political organisations and with less reified legal systems, there may not be such a distinction between public and private law spheres, however much aspects of socio-political authority and of use and exploitation remain distinct. Control and management rights may also be constructed in a tiered fashion, and are increasingly so with international levels of authority and regulation. In such cases, the rights may be delegated among various levels of political

[21] Maine (1861) saw this distinction in terms of historical evolution, arguing that in ancient law the law of things was not (yet) divorced from the law of persons.

[22] On the systemic nature of law, see K. von Benda-Beckmann (2003).

[23] Perhaps the confusion arises from the fact that the sticks representing socio-political control are usually held by political authorities. In state-organised societies, these sticks are one element of state sovereignty (Beitz 1991: 243).

[25] See F.von Benda-Beckmann (1979: 45); Goodenough (1951).



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Deleted: Muttenzer (this volume) however, rejects this approach, and instead sees the two as arising from quite different sources of justification.[24]

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and administrative organisation. We can therefore speak of 'relative publics' (F. von Benda-Beckmann 2000). Many such relative publics, for example, are contesting for some degree of control over commercial aspects of the human genome or over various kinds of cultural property (Pálsson 2006, Wiber 2006).

Aside from this total set of all possible analytically distinguishable rights associated with the concept of property, the bundle metaphor can also be used to elucidate the wide variation of *specific categories* of property objects and rights (however legally elaborated) such as private ownership, as forming a bundle of rights in themselves. In most societies, there are a few 'master categories', such as private ownership, lineage property, or state domain, with a range of quite specific rights bundled together and attached to them. This master category bundle metaphor is useful in two ways. First, it allows us to examine how the individual sticks in the master category bundle have been distributed among potential holders under processes of production or of historical accommodation. Second, it allows us to track variation in what is meant by a master category such as private ownership across cultural examples.

With respect to the first use, for example, we can track how lesser, conditional and temporary rights can be derived from the master category bundle and transferred to other holders (for instance through leasing or pledging). Eidson (2006) shows how individual farmers in socialist Eastern Germany were pressured into delegating rights over their private farms to managers of collective enterprises. They did not, however, lose their residual rights as owners, and were able to reactive their rights after the end of the socialist regime, albeit not without difficulties. The holder of the master bundle in such cases maintains residual rights since many or most of the benefits are temporarily transferred in a provisional way. Note however, that residual and provisional are relative notions. A provisional right is provisional only in relation to the residual right from which it is derived, but may also become residual itself if the right is again delegated on to yet another party. An absentee landlord, for example, can grant rights to a tenant, who in turn delegates them to a sharecropper.[25] Such delegated rights may be derived not only from private law but also from public law. The Icelandic government, for instance, created legally protected economic positions by gathering genetic/medical information from the public and then handing out the rights to the resulting data bases to pharmaceutical companies, and these rights are also provisional in nature (see Pálsson 2006).[26]

In those situations where more than one set of legal orders specifies property objects, property holders, rights and obligations, and acquisition and transfers quite differently, economics and policy science has tended to privilege state law and property rights, although some attention has been paid to non-state normative systems or processes of private ordering in industrialized states (Ellickson 1991). But in Minangkabau, for example, state law, village level adat and Islamic law coexist. State law and adat classify the same natural resources as different kinds of property belonging to different property holders, while adat law and Islamic law direct the flow of property after death to quite different heirs (F. and K. von Benda-Beckmann, this volume). In other contexts of legal

[26] One of the more interesting features of the human genome debate is the question of who has rights in this new valuable or set of valuables, and which rights are provisional and which are residual.



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pluralism, as in the case of *ejidos* common lands in Mexico (Nuijten 2006), partially-articulated property norms are treated as valid locally without real opposition to the state law as the primary legal system. Thus, as Peters (2006) notes, the actual character of co-existence for plural legal orders may vary significantly from relatively peaceful co-existence, to open conflict, to combination into hybrid forms. In some cases, hybrid forms may become institutionalized. Colonial and post-colonial history provides many examples, as does the establishment of joint management for restored (private) property among black communities in South Africa (James 2006). Such plural legal situations can also provide alternative procedural avenues to pursue where claims based on different rule systems may be played out against each other in 'forum shopping' strategies (K. von Benda-Beckmann 1981, 1984).

***Concretized Social Relationships***

We distinguish the above categorical property relations from 'concretized' relations that find expression at the layer of actual social relationships, that is in relationships between actual property holders with respect to concrete valuables. Examples would include such statements as: 'I am the owner of this house', or 'Mrs. Syamsiah holds these three ricefields that have been allocated to her as part of the lineage property', or 'Mr. A receives water at this time in the rotation scheme in irrigation system X.' Such statements refer to property relationships that substantiate but are not the same as categorical rights. In addition, these categorical rights are based on criteria (defining holders, objects, rights and responsibilities) that are often subject to negotiation, dispute or open struggle, and in the process property relationships often change. We see an example of this in the emerging arrangements for water rights in Colorado (Schlager 2006), where established patterns of water rights were renegotiated to deal with the consequences of widespread groundwater pumping. In many cases this emergent character of concretized property relationships is the consequence of plural legal situations that provide rich opportunities to construct different property relationships by reference to diverse normative legitimation for claims and counterclaims (F. and K. von Benda-Beckmann 2006).

Concretized property relationships should also be interpreted within the context of the wider social networks where they form one important component of multiplex relationships. Visser (2006), for example, shows why managers of large farm enterprises in post-reform Russia can rarely downsize their farm workforce, or even dismiss negligent workers, given their multi-stranded relationship with the farm labourers. A similar situation pertains between legitimate members of the Mexican *ejido* described by Nuijten (this volume) and more recent residents without *ejido* rights. Members of the *ejido* find it difficult to deny non-members within their community a plot of land to work given their many social ties.

Concretized property relationships can also be analyzed through the bundle of rights metaphor.[27] First, we can look at the concretized distribution of the individual sticks bundled in one master category to one actual property object, let us say an individual owner

[27] While both categorical and concretized property relations can be usefully seen as bundles of rights, they are bundles of a quite different nature. We see this if we extend the use of the metaphor more systematically to actual property relationships.



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with respect to a specific farm. As mentioned above, she may be the owner, but may have conferred rights to manage the farm to another. The latter may have leased it to a tenant, who may have contracted a share-cropping arrangement. In such a case, sticks of ownership rights normally considered as forming a unit are in fact widely distributed over different holders. Behind the mask of private ownership often lurk such complicated arrangements, and management rights often become much more important than the residual ownership aspect of property.

Second, we can examine the several bundles of property interests held by a single person or property holding unit (corporate group, lineage). The property holder may be the owner of a house, of financial property, of pawned land, of some form of lineage property, and of their own medical history, including information collected into the genome data base. This use of the bundle metaphor allows us to examine the ways in which a single property holder can collect rights that subsequently form interacting sets, with implications for the uses and exchange value of any one piece of the total property in which they have rights. If we examine more deeply the human genome example in Pálsson (2006), for example, we can ask critical questions about the outcome of a single pharmaceutical corporation that seeks to acquire rights to the human genome, and who also owns the laboratories that do the genetic testing, the patents that emerge from the testing, the data bases that place the results in a broader genetic context, and the medical products generated from this research. This use of the bundle metaphor allows us to investigate the relationship between accumulated property rights and economic or political power.

Third, we can examine the rights that over time have accreted to, or are 'bundled in', a single property object. This may involve both private and public law rights. For instance, a single house of historical interest can be the object of quite different rights held by an owner, a tenant, and a municipal government or heritage organisation. Such sets of rights are even more complicated when we look at different kinds of collective property; many of the contributions to this volume show that a careful unpacking of what is hidden behind the 'communal' label will often disclose quite complicated sets of rights that have become associated over time with a single resource or valuable. For example, Wiber attempts to tease out the various types of collectives that have all lodged quite legitimate claims to a single shaman's drum, or to skeletal remains of significant antiquity. Various other sorts of 'new property' (Reich 1964) provide more complex examples (see also K. von Benda-Beckmann 1995). Consider a DNA test based on two genes (BRCA1 and BRCA2) that helps to predict the risk of developing breast cancer (Godrej 2002; New Internationalist 2002:25). Myriad Genetics, a Utah-based biotechnology company, first patented the test to identify the genes, and then placed over twenty-five patents on them, and the proteins related to them, effectively limiting any further medical uses. They argue that testing for these genes must be done through their labs, regardless of where in the world the patient is located. European labs flout the patents by continuing to test for the genes, and in May 2004 the European Patent Office revoked the European patent on the breast cancer genetic test (Pollack 2004: 16). If we consider BRCA1 and BRCA2 as individual property objects, we can investigate that total package of rights claims that they have acquired over the process of their discovery, documentation, patenting and use in medical testing. Such investigation should begin with whether such valuables qualify as property objects. Different legal regimes are taking different approaches here.

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### *Property Relationships at the Layer of Ideology*

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Property relations are also expressed at the layer of general cultural ideals, ideologies and philosophies. In contemporary societies, property relationships at this layer all tend towards considerable plurality as we discussed in our 'Unpacking the Freight' section. Consider the competing ideologies of capitalism and communism, possessive individualism and the moral economy, welfare state ideologies and neoliberalism. Such ideologies differ considerably in their representation of and justification for both legal-institutional and existing or desirable property relations, and most diverge sharply from the reality they purport to represent. Kingston-Mann (this volume), for example, illustrates just how far common understandings of the period of the enclosures in Britain have strayed from the historical evidence.

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Property at the ideological layer, then, needs to be distinguished from legal-institutional expressions, because of the way they can deviate markedly from each other. Because property regimes have evolved over long periods of time, and because different ideologies and philosophies have made an imprint on such regimes at any one point in time, neither ideology nor the legal-institutional property regimes are internally fully coherent. The diverse ideological expressions find some correspondence in the legal frameworks in the sense that general and vague notions are specified and delineated into formal property categories and rights. But as many of these notions are contradictory, both legal frameworks and actual property relations will also contain many contradictions, as most of our contributors point out. Given this divergence, the ideological layer must be treated as quite separate phenomenon from both the legal-institutional layer with its categorical property relations and the layer of concretized social relationships. Taken together all these layers constitute important conditions that potentially constrain and enable people's dealing with property. Distinguishing these layers cautions one not to draw false conclusions about 'gaps' between actual practices and a conflated ideological-legal-institutional complex (see Moore 1969).

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## Working with the Analytical Framework

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The analytical uses of the bundles of rights metaphor and the distinction between the different layers at which property is expressed allow for a systematic elucidation of the variations that pertain to property relationships. They also provide important points to be considered when theorizing about property at the layer of actual social practice. With respect to both points we come back to our critical dialogue with the 'Big Four' conventional property categories (open access, state/public, common/communal, and private property). We argue that these categories do not form a useful and consistent set that applies uniform criteria to the classification of diverse property categories. We further maintain that the 'Big Four' reduce complexity in misleading ways and form a poor point of departure for theorising.[28]

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[28] It is notable that many scholars who use them frequently begin by acknowledging that the 'Big Four' have their limitations. Unfortunately, they then go on to argue that the simplifications remain the best categories available.

***Descriptive utility***

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We argue that our approach has a number of advantages both in terms of longstanding property forms and of 'new' properties that have emerged due to political and technological developments. Our framework allows for an examination not only of legal property categories, such as individual or state ownership, but also of the range of other rights pertaining to any actual property object. And within state spaces, it takes both the realm of private law and the public rights pertaining to each kind of property into consideration.

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The conventional four categories are inconsistent in this respect and conflate criteria in different combinations of sources, types of rights, types of holder, and categories of objects. As a result, the categories do not cover the range of variations one wants to distinguish empirically and to theorise about. Private property, for instance, is usually identified with private individual ownership. This ignores the very real possibility that private property is held by groups, associations, corporations, or as joint or communal ownership. Moreover, private rights are not necessarily ownership rights; they can for example, be sharecropper rights, or tenant rights. In the category of common or communal property, radically different mixes of rights of individuals, or smaller and larger social groups are thrown together. And this is an important point, as it is usually multiple holders that is the selected criterion for the definition of common property while the type of holders and kinds of rights remain unspecified. Holders of common property can in fact be everything from spouses, to some or all members of a village, or the entire state.[29] Common rights may be ownership rights or use-rights and in fact, much communal property may be held as private rights (see Lynch 1992). This leads to a great deal of confusion in the analysis of collective choice practices and the future of common property management.

With respect to open access resources, on the other hand, the difference between the legal status of the property object and the rights pertaining to it is usually effaced.[30] The rights concerned are legally unrestrained access and use of the resource. The question of what happens to those parts of the presumed open access property that *are* appropriated, as for example with the transformation of land declared *terra nullius* into private or state property, is usually ignored despite the fact that under some legal regimes, 'virgin' resources retain this status after some kinds of use and appropriation. Moreover, when open access resources in Third World states are discussed, it is no longer the legal status of resources but actual social conditions and practices of open access that suddenly become prominent. For instance, it is regularly mentioned that when states take over resources, thereby undermining local traditional rights yet not able to exert full control, these resources factually turn into open access, no man's or everyone's property in the conceptual schema. Legally speaking, however, these resources have the legal status of state domain or state ownership, and at the same time, of clan, tribal or common village land under local

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[29] See also Cole (2002).

[30] After Hardin's (1968) essay on the commons, many scholars attempted to clarify that commons such as grazing lands were rarely open access resources, but rather institutionalized property resources. However, little has been done in analyzing actual open access resources.

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law. As we have mentioned, these differences in analysis are not just an academic quibble but have very different political implications.

***Theoretical Utility***

As the contributions in this volume show, the 'Big Four' actually collapse a variety of property bundles under the same category. Using them as point of departure for empirical or theoretical generalisations therefore, eliminates essential differences within the categories and makes useful propositions or policy unlikely. It is symptomatic that the close (sometimes causal) link between specific property categories and certain patterns of economic or ecological performance has somewhat fallen out of favour. It is now more frequently avowed that high degrees of unsustainable resource use can take place with all types of property (Dietz et al. 2003), with the explanation for this sought in variables external to property. Yet our contributors often demonstrate that with more specificity in the unpacking of property relationships, we can better understand the property dimensions of some of these phenomena. For example, when Sikor (2006) explores the environmental consequences of the restoration of private property rights in the Czech republic, he is able to illustrate how state agents and the restored farm owners have very different conceptions of the sticks in a private property bundle, particularly as relates to the responsibility of sustaining rural environmental amenities.

A significant problem is that much property theory fails to distinguish between categorical and concretised property relationships. In most writings on the relationships between property and economic or ecological development, *categories* of property rights are assumed to inform people's behaviour and to affect resource allocation or sustainability of natural resources directly, while actual property relationships remain largely unnoticed.[31] While categorical and concretised property relationships cannot be dissociated from each other because concretised property relationships are in various ways shaped by categorical criteria, they are different social phenomena and constitute different constraining and enabling elements for social interaction.

***Understanding Property practices***

Property ideologies, legal institutions and concretized property relationships are all part of wider contexts that form the conditions under which social interaction takes place. They constitute a set of potential factors motivating, constraining and enabling actual dealings with property. In everyday dealings with property and especially in disputes, property ideologies and legal rules provide a repertoire of social resources through which people can rationalize and justify their interpretations of current property conditions or claims for change. But the kind of social relationships that interacting parties are involved in, the range of property they hold, and the embedded nature of property relationships may have a much stronger influence on people's dealings with property than property rules and types of rights. The way any person deals with a resource will largely depend on the other property

[31] See Feder and Feeny (1993: 241). When the embeddedness of property relations is concerned, however, the focus is usually on the embeddedness of the property *relation* in other social relationships, while other sorts of embeddedness, such as of categorical property rights in the legal (or ideological) realm, are ignored.



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relationships they are involved in and on the economic wealth and opportunities these embody. This is important with respect to dealings with any type of property. For example, the much debated 'tragedy of the commons', taken seriously on the level of an open access model, can only be understood in relation to privately owned cattle that require grazing. Most people, as we have pointed out, have rights in property of different kinds. What they do with those rights is likely to depend on the mixture of rights they have and their wealth (see Balland and Platteau 1996; F. von Benda-Beckmann 2001). Poor people who hold only provisional and temporary rights in a property object owned by someone else, or who have very few resources to invest in their private land (as in the James examples from South Africa), have different options and are likely to employ the resource differently than might others better endowed.

We have already spoken to the issue of the embeddedness of property relations in other social relations as an important factor. One further point to make here is that while property interactions maintain (or change or create new) social relationships, the maintenance or change are also outcomes of wider interactions with wider intended and unintended consequences. In the many examples already given, both production *practices* and social *relationships* are shaped by the principles and rules of property law, but they are not the same as those principles and rules. All these (inter)actions contribute to the maintenance and change of concretized property rights as actual social relationships. In a more indirect way, they also contribute to the maintenance or change of the categorical property order which is inscribed into these relationships. This becomes more obvious in situations where both categorical and concretized relationships are undergoing new stresses and strains, as in the many situations recounted by our contributors who focus on the restitution of land rights, either in post-socialist states or in Africa.

***Theorising Property and Change***

These examples show that ideologies, legal property systems and actual property relationships are different factors necessary to the analysis not only of existing property practices but also for imputed economic or ecological significance of specific property types under processes of change. We have already highlighted the need to distinguish categorical and concretized property relationships. Most economic property theories focus on the categorical property rights rather than concretized property relationships. Further, what often seems to be an outcome of rules and categorical property rights may in effect be a result of actual accommodations or innovations in property objects, property holders or property practices. Moreover, if categorical and concretized property relations are not kept separate, it will be impossible to analyze their potential interrelations. It becomes difficult to explore, for instance, whether certain types of property rights are likely to lead to concentration and accumulation of property by a few or to a relatively secure access to resources for the many; whether they will have weaker or stronger affects on social security and economic development, or whether they are likely to lead to more or less sustainable resource use.[32]

[32] For example, see the F. von Benda-Beckmann (2003) critique of De Soto (2000). For examples in which some of these distinctions have fruitfully been made, see F. von Benda-Beckmann (1990); Berry (1988); Bruce (1988); Chambers and Leach (1989); Peters (2002); Sugarman (1981); Thompson (1993); Van de Ven (1994).



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The ways in which property law is embedded into the wider legal system also has implications for change. While legal institutional orders are rarely fully systematized, changes in other parts of the legal order may spill over into property law, or changes in property law may be constrained by the structure of the wider order. Alexander (2004) has shown how this systemic nature of property has turned large parts of former socialist states into economic wastelands, as a factory here or a retail outlet there was privatized, while the rest of the infrastructure fell into collapse, rendering the new private property profitless and depriving the workers of many social services that used to be part of the socialist industrial complex. Many societies have undergone dramatic change in the balance of property rights between individuals, groups and the public sphere, that in turn affect the entire system of property rights. Property law reforms of land or water rights, where specific property rights are promoted and substituted for others without taking into account the existing interconnections, often run into great difficulties of implementation and trigger off undesired and unintended consequences.

It goes beyond the scope of this paper to attempt a comprehensive analysis of the relations between categorical and concretized property relations and socio-economic change. We only want to point out here that a clear association or congruence cannot be assumed between the dominant categories of property and sets of property relationships and their economic significance in a given historical situation or development. This is true whether speaking of old or new forms of property. Sometimes a property regime remains unchanged over long periods, while being flexible enough to facilitate quite different economic and social arrangements, as the example of *ejido* common lands in the Nuijten contribution illustrate. Without any change in the legal status, Mexican village common lands have supported the grazing of privately owned herds of cattle, the production of illicit drugs, the household production of subsistence maize and the rental of land to neighbouring villages, whether sequentially or at the same time.

Categorical and concretized property relations may change with different speed, and the factors underlying their maintenance and change may also be different. One example is the pressure on existing intellectual property rights (as in copyright) as a result of the internet downloading of music. There are other examples where property law frameworks remain stable, yet concretized property relationships and economic organisation undergo significant change.[33] One reason for this may be that many rules and procedures concerning property rights, distribution, transfers or inheritance leave considerable room for autonomous decisions of property holders over use, sale, pawning or devolution. In similar fashion, there may be periods where the categorical property system is transformed, yet concretized property relationships hardly change. The reforms of land law in many Third World states have demonstrated that the intended transformation of property rights rarely has the expected outcome because right holders may refuse to redefine their property

[33] Renner's (1929) study of European property systems is probably the first to show that in the transition from petty commodity production to capitalist production, important changes in the constellation of property relationships and their social, economic and political functions (*Funktionswandel*) could occur without any important change in categorical legal construction of property and labour relationships (*Normwandel*). Similar patterns have also been demonstrated in studies on rural development in the Third World. See also for Europe, Sugarman (1981); Tigar and Levy (1977); Thompson (1993). For the Chagga in Tanzania, see Moore (1986).

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relationships in terms of the new categories or to use the opportunities to change concretized relationships through the new options for transfer offered by the categorical system.

Finally, under yet other conditions, changed property law may also bring about significant changes in concretized property relations and economic (re)organisation. The creation of some new property categories (gene patents, cultural property, fishing quota), and their commoditization may change the property object considerably, often by splitting it up into smaller units that then become subject to different property rules (as in the human genome example) and to different concretized property relations.[34] Many quota regimes are examples where certain aspects of the previous ownership right to land, cattle or fish are excised and are (re)distributed via an administratively created quasi-market to the holders of the quota while older practices become illegal or negatively sanctioned by the state,[35] both with far reaching consequences. The new quota rights often accrued not to the former property holders, but to wealthier persons, and to larger corporations, as in van Meijl's New Zealand example. But these redistributions facilitated by new kinds of property are not different in kind from older examples such as land rights reform. When reforms were taken up by rural people in the Third World, with the result that many rights based in traditional law were transformed into ownership rights, concretized property relations were considerably changed because many lesser rights under traditional law could not be translated into the new property categories and were repressed. The unintended consequence was often a particular change in the gendered distribution of property rights, to the disadvantage of women. In the privatisation and distribution of the commons to the poor in India, other quite substantial changes in actual property relations took place. This privatisation successfully redefined the property relations to the commons such that within a short period of time a significant amount of these new property rights had been sold and accumulated by the richer farmers (Jodha 1986). Recognizing the various layers at which property is expressed can help to explain all of these very diverse relationships.

## Conclusion

The heavy intellectual freight attached to property has derailed our understanding of the 'work of property' (Verdery and Humphrey 2004). Unpacking this freight has proven fruitful. On the way we have touched upon a range of disciplines and academic traditions that all deal with property, each with different assumptions and with a different focus of interest. We have also warned of some of the dangers of borrowing and of the cherry picking of ideas and assumptions across disciplines. The high inter-referentiality in the study of property has generated interesting insights, but has also led to some pernicious problems of analyses and comparison. Rather than providing a new theory of property, we have attempted to provide the outline for an analytical framework that could serve as a basis for dissecting property relations and thereby generating more adequate theory

[34] On intellectual properties, see Coombe (1998).

[35] See F. von Benda-Beckmann (1992); Wiber (1995, 1999, 2000, forthcoming); Wiber and Kearney (1996); Wiber and Kennedy (2001).



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building. It is an approach that builds on the metaphor of property as a bundle of rights, but it makes much greater use of the metaphor. We have argued that ideologies, institutions, concretized property relationships, and the social practices affecting all three, are the basic layers that allow us to understand property, especially in conditions of legal plurality. These analytical distinctions between layers of social organisation are useful for whatever domain or aspect of social organisation one is interested in. They go beyond the frequent dualisms between ideal/real, law/practice, ideology/practice, institutions/interaction, structure/agency, which still dominate methodological assumptions. This is particularly relevant in property issues because most property theories fail to go beyond a distinction between legal institution and actual practice. The layers have to be analyzed in their mutual interdependence, and none should be privileged over the others. We think that such an approach is an advance over institutional approaches that either put too much emphasis on the categorical legal institutional framework (rules of the game)[36] or treat institutions as compounds in which 'complexes of norms, rules and behaviors that serve a collective purpose' are lumped (De Janvry et al. 1993).

Paying attention to the systemic nature of property and to the contexts in which property relationships and property practices are embedded allows one to study property change in its wider contexts without inferring too much about how changes on one layer affect the other layers. More specifically, it allows us to see in what respect the new properties are really new. We have seen that what seems to be totally new turns out to be new in some limited respect only. Increasing state regulation that diminishes the scope of entitlements for property holders is not new, but fish quota and human genetic patents are new types of objects. But more than that, they are examples of the mechanism through which state regulation inadvertently creates new property simply because people start using these instruments of state regulation as property. Partitioning off parts of what used to fall under the older bundle of ownership has a long tradition as the examples from wastelands appropriation in colonial states show. The human genome is an extreme example, and an example that has deep emotional underpinnings. However, some of the partitioning that took place in colonial forests and wastelands probably had similar emotional repercussions compounds in which 'complexes of norms, rules and behaviors that serve a collective purpose' are lumped (De Janvry et al. 1993:566).

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[36] See Feder and Feeny (1993); North (1990); Ostrom (1990).

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Concepts of property as the foundation for civic responsibility, derived from Greek and Roman law for example, evolved and changed in the struggle for democracy and universal suffrage in Western Europe and in the Americas, and are changing again in the privati

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zation frenzy that has followed the end of socialist regimes. This is in part because political models for transforming former socialist countries have privileged private property rights as a mechanism to address the poor performance of socialist institutions in their public tasks. This poor performance was explained through the erroneous reasoning that all property was owned by the state and thus the state was overburdened and unable to satisfy basic needs. Where former autocratic regimes in the Third World have been dismantled, meanwhile, a somewhat contradictory approach advocates decentraliz

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ation and the devolving of responsibility to smaller geopolitical units, often by promoting community-based management. James (this volume) addresses both privati

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sation in her evaluation of the post-reform situation in South African black communities. Where appropriated land was restored but did not yield the expected benefits, James found part of the problem to be the under-funded restitution process, such that groups of people were forced to pool their restitution money to buy land. Unfortunately, the subsequent neoliberal devolution of state welfare responsibilities to these newly constituted communities caused significant problems, as the communities lacked the required resources.

Meanwhile, the concept of ethnicity as integral to natural political boundaries has resurfaced in current debates about aboriginal self-governance, often with collective property rights replacing territory as the foundation for group identities. Van Meijl (this volume) explores the challenges created by this approach in New Zealand, where the privati

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sation of fishing rights in the commercial fishery has resulted in conflict between Maori communities with claims to those rights. He notes how a misunderstanding of Maori social organis

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ation that has been reified by state courts has privileged rural Maori over the larger urban Maori population, and has pitted North Island Maori against those of the South Island.

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A number of contributions to this volume address this model. Kingston-Mann, for example, challenges economic assumptions about common property, particularly those archetypal examples frequently referred to in economic theory. Her close reading of the historical record on the productivity of both the British common lands and early Russian communes shows that in both cases, common property was actually much more efficient than previously thought. Further, poor rural commoners were more often the first to adopt agricultural innovations. In the British case, state subsidies for elite producers had far more to do with economic growth after the enclosures than did property reforms. Eidson's more recent historical analysis of the East German collective farm enterprise illustrates the wide variation that existed between socialist state property orthodoxy and actual collective farming practices. Socialist collectivi

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sation actually took quite different forms as a result of the varying social contexts in different socialist states. In the German case, for example, there were many opportunities for individual enterprise and for innovation within several distinct types of collective farm.

In the wake of the apparent failure of privati

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sation policy in rural Russia, Visser looks inside the '

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of the internal dynamics of collective enterprises to explain the rapid deterioration of rural productivity. His focus is on the labour relations within surviving large-scale agricultural enterprises, since western advisors often blame rural workers who are said to block restructuring. But Visser finds that both agricultural workers and farm managers are caught in a trap of reform's making, unable to overcome chronic shortages and the structural disintegration which have crippled farm operations. As with the paper by James, the above contributions make a strong case for examining the real consequences of privatising social services, infrastructure, market facilities, and the environment along with productive resources. In each of these examples, changing one aspect of the property infrastructure nexus has led to serious impediments for putting resources to economic use. While Peters also addresses the fetishi

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sation of private property rights common to both Africa and to post-socialist states, she goes further to query the anthropological solution of focusing on the embedded nature of property. She argues that anthropological models of embeddedness are too focused on resisting this fetishi

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sation and not enough on developing significant theoretical alternatives.

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compounds in which "complexes of norms, rules and behaviors that serve a collective purpose" are lumped (De Janvry, Sadoulet and Thorbecke 1993).

Paying attention to the systemic nature of property and to the contexts in which property relationships and property practices are embedded allows one to study property change in its wider contexts without inferring too much about how changes on one layer affect the other layers. More specifically, it allows us to see in what respect the new properties are really new. We have seen that what seems to be totally new turns out to be new in some limited respect only. Increasing state regulation that diminishes the scope of entitlements for property holders is not new, but fish quota and human genetic patents are new types of objects. But more than that, they are examples of the mechanism through which state regulation inadvertently creates new property simply because people start using these instruments of state regulation as property. Partitioning off parts of what used to fall under the older bundle of ownership has a long tradition as the examples from wastelands appropriation in colonial states show. The human genome is an extreme example, and an example that has deep emotional underpinnings. However, some of the partitioning that took place in colonial forests and wastelands probably had similar emotional repercussions for those newly excluded. Other contributions in this volume have shown how changes in regulation and in the character of property objects have often generated changes in categorical property relationships and practices. The examples we have discussed here show that changes in property are not one-way processes. Change may be initiated at any specific layer, and that change then typically feeds back into other layers, leading to imbricated adjustments. Once we have understood the characteristics of these loops of influence within the layers of property regimes and in their wider contexts, we can begin to understand the relationship between specific property categories and political, economic, or ecological change.

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