

Principles of Property Law

Principles of Property Law offers a critical and contextual analysis of fundamental property law concepts and principles, providing students with the necessary tools to enable them to make sense of English land law rules in the context of real world applications.

This new book adopts a contextual approach, placing the core elements of a qualifying law degree property and land law course in the context of general property principles and practices as they have developed in the UK and other jurisdictions in response to a changing societal relationship with a range of tangible and intangible things. Also drawing on concepts of property developed by political and legal theorists, economists and environmentalists, *Principles of Property Law* gives students a clear understanding of how property law works, why it matters and how the theory connects with the real world.

Suitable for undergraduate law students studying property and land law in England, Wales and Northern Ireland, as well as postgraduate students seeking an accessible analysis of property law as part of a course in law, land administration, environmental law or development studies.

Alison Clarke is a property lawyer who started out as a solicitor in private practice specialising in commercial land transactions, but has spent most of her career teaching property law principles, mainly at the Faculty of Law in the University of Southampton and at the Faculty of Laws at University College London, but also at law schools in Germany, France, China and Japan. She teaches and writes on property law from a comparative perspective, with special interests in communal, collective and co-operative resource use, plural property rights systems and indigenous land rights, and the role of property law in regulating our relationships with the natural and built environment. For many years, she has also co-edited one of the leading practitioner textbooks on land transactions in England and Wales. She is currently Emeritus Professor of Law in the School of Law at the University of Surrey.

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Preface

This book is about the legal relationships we – as individuals, as groups and as communities – have with the land we inhabit and with some of the other resources we utilise (or perhaps value for something other than their utility). Property law emerges, in characteristic ways, in all societies to regulate these relationships. The underlying objectives of this book are to explore why it does so, and how the nature and content of the law are shaped by the social, economic and political conditions out of which the law emerges, and in which it develops. The idea is to bring readers to the point where they can (and feel inclined to) question assumptions and arguments about what the institution of property is, what it is for, what it can achieve and whether it does in practice achieve what we want it to achieve. In particular, the book invites readers to take a critical view of the property rights system as it operates in England and Wales today, focussing on the way it operates in relation to land, taking ‘land’ in its broadest sense, encompassing not only the surface of the earth and things growing in or built on it or lying beneath it, but also the physical spaces we live, work and socialise in and move through, the ecosystems we depend on and the landscapes we value.

Current orthodoxy is that, if we want to understand what property law is, we have to let go of this idea that property is about a lineal relationship we have with a thing. On this orthodox view, what it is ‘really’ about is the relationships that individuals (human and corporate) *have with each other* in respect of things, and the core relationships are relationships of exclusion and power: property is about one person’s right to exclude others from a tangible or intangible thing and consequently to dictate the terms on which others may use it. This book challenges the orthodox view by bringing in three crucial elements of property law which the orthodox view tends to miss or obscure, and which are particularly relevant to property interests in land.

The first crucial element is that, to the extent that property is indeed about social relationships between people, it is also about relationships of inclusion and co-operation, as well as relationships of exclusion and power. If we really want to know how property works, we need also to take into account the ways in which people share resources (as families, communities, neighbours, or common interest groups where each member’s use of the resource affects the ways in which it can be used by the others), and we need to look at the legal rules we have developed to regulate these kinds of shared resource use.

The second, and related, element is that the orthodox property analysis understates the rich variety of property interests and property interest-holdings that the law has developed, particularly in relation to land. On the orthodox view, the single private owner is the paradigm holder of property interests. The focus is on the single human being who has a monopoly of the legal rights and powers over his bicycle, or his piece of land or whatever else he owns. However, whilst some resources are indeed wholly owned by a single private human individual, this is more likely to be true of bicycles than it is of land. The reality is that this kind of absolute ownership is just one of many different kinds of property interest that property law recognises in things, and that all of these different kinds of property interest (including absolute ownership) can be held not just by a private human individual but also by a wide range of other entities (co-owners, trustees, commercial corporations, public and private organisations carrying out public or charitable functions, and unincorporated groups and communities of all kinds). If we assume that property law revolves around the paradigm of the single human absolute owner, we misunderstand how it operates in the real world. So, this book aims to map out the range of property interests recognised in our property rights system, and the kinds of entity that can hold them, contrasting them with the range recognised in other jurisdictions, and seeing how they differ depending on whether we are talking about property interests in land as opposed to, say, in broadcast frequencies or human bodies and human bodily products.

The third correction to the orthodox view of property law is to question the assumption that property law is *only* about the relationships people have between themselves in respect of things. It is also, to an important extent, about the direct relationship humans and human enterprises have with our natural environment, and again this is most obviously true when we look at property interests in land. Scientific advances have enabled us to understand the direct impact that our actions have on our environment, and to appreciate that we have responsibilities towards the resources we control, utilise or inadvertently affect. The idea that property law might have a role in enforcing those responsibilities is beginning to be accepted in our legal culture and in property rights systems similar to ours, and, as we aim to show, it has always been central to property rights systems in other cultures. So, whilst we certainly do not claim to cover even the most basic principles of environmental law, we do aim to open up the question of the proper role of property law in regulating our relationship with our physical environment.

So, although the book focusses on land law in England and Wales, it takes a broader view than other texts. It looks at our system by reference to underlying common law property principles, and also invites readers to look beyond our own jurisdiction to explore how things are done in other kinds of legal system. It makes no claims to provide any kind of systematic comparative study: the idea is to alert readers to interesting comparisons and contrasts they may want to pursue for themselves. The book also introduces and utilises concepts of property developed by economists, philosophers and legal theorists, and by scholars from other disciplines. The aim is to provide undergraduate property law students – the primary audience for the book – and scholars from other jurisdictions and other disciplines,

with the tools that will enable them to make sense of what are often thought of as boring and mystifying English land law rules, and to see how they fit into the bigger picture.

In building up this more wide-ranging picture of property, the book aims to cover all the topics generally taught in a Qualifying Law Degree property law course in England and Wales, although – inevitably – not always at the length or in the detail that some will want. As a teaching book, it is aimed at teachers (and students) who choose to cover a few topics in depth in the limited time allowed in the curriculum for property, rather than take a quick gallop through everything.

With that in mind, each chapter is, as far as possible, self-standing, and starts with an introduction designed to give an overview of the chapter and explain how it connects with the others. Each chapter then ends with some general questions and lists of recommended materials to read. Most of this recommended reading consists of extracts from cases and other materials, and some of these extracts can be found on the book's website, www.cambridge.org/clarkeproplaw, alongside suggested topics for further research. The reading is listed roughly in the order it appears in the text. Generally, the law is up-to-date to May 2019, although it has been possible to include some later material.

The book would not have been possible without the generous help and encouragement of colleagues, family and friends, and the intellectual stimulation provided by them and by generations of students. Out of the many colleagues whose ideas about property and property law have helped to shape mine, I must record specific thanks to three great friends and collaborators: Christine Godt, who first introduced me to the glories of comparative property law in general and German property law in particular, and whose friendship, company and hospitality I have enjoyed ever since; Julian Farrand, who knows more about property law than I shall ever know, and whose knowledge and understanding have informed and entertained me over the many happy years we have spent as friends and co-writers; and Rosalind Malcolm, my great ally and friend at the University of Surrey, for stimulating my interests in the political dimensions of property, and for introducing me to the world of environmental law and encouraging me to explore where and how property law fits in. The other colleague and friend whose help I must acknowledge is William Twining, a colleague at University College London for many years, whose help and encouragement in embarking on the book – and, even more, in finishing it – have been invaluable: the book would not have been written without him. I also want to record my thanks to the people at Cambridge University Press who have continued to provide outstandingly patient and persistent support and encouragement throughout the over-long period it has taken me to produce the manuscript. Finally, I have to thank Leo, to whom the book is dedicated, whose patience in waiting for me to finish the book proved to be inexhaustible – but only just.

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