Welfare-Based Real Property Law (in Norway?)

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This article[1] aims to move real property law from implicit to explicit recognition of economic efficiency as a tool and criterion – like in market law, (other) natural resources law, and tax law. In addition to having been close to explicit recognition through statutory decree (section 2), I explain my "as if" interpretation of a "welfare-based" real property law (section 3). Moreover, I propose that a new consolidated real property law statute explicitly declare economic efficiency as a main rationale for its rules (section 4). This is followed by discussion of potential critiques (section 5).

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1. Introduction

Economic reasoning may become intrinsically "legal" in two different ways. First, some written rules, like competition laws, *explicitly* target economic efficiency. Similarly, economic efficiency is an important consideration in natural resources law. Avoiding economic waste is a significant concern in tax law, in the sense that tax law aims to minimize unnecessary deadweight losses and prefers legal interpretations that achieve this goal.

Second, economic reasoning is sometimes relied upon (more *implicitly*) within the legal system. Certain "rhetorical figures", with the support of various formal legal sources, add weight to economic reasoning in judicial decision-making. This is particularly the case in areas of law that have a "common-law character" (being developed, in part, through case-by-case judicial decision making), such as contract, tort and property law. A first example is the tendency to show respect for mutually beneficial agreements. A second example is the often-expressed concern that the aggrieved party be made whole, or fully compensated, and thus the desire to "get the price right". A third example is the attempt to balance the interests involved in the conflict, using a cost-benefit style of reasoning.

The legal-scientific role of economic reasoning and analysis in all these situations can be distinguished. On the one hand, economic reasoning may be the accepted tool according to established standards of legal reasoning, as in the first category described above. On the

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other, economic reasoning may provide a valuable approach to the legal subject matter, as in the second category described above. This distinction can be seen as identifying two poles of a spectrum indicating the extent to which economic reasoning contributes to legal reasoning.

In this paper, I will attempt – in a theoretically inspired legal analysis of recent and current practice – to move Norwegian real property (land) law from the implicit pole to the explicit pole. My claim is that economic reasoning and analysis should be an accepted tool according to established standards of legal reasoning in real property law. In addition, I set out a corresponding legal policy proposal, addressed to a future codifying legislator.

For my purposes, I see little need to provide a detailed, technical definition or characterization of what efficiency in law may or may not mean from the standpoint of modern, professional economic research. I am instead content, in this paper addressed to a future codifier, to rely on intuitions and understandings that are consistent with the Robbins definition of economics (see below) and with the intellectual path set out by Coase and Calabresi and mainstream law and economics more generally. I have followed – and attempted to contribute to – these theories for quite some time, in a form I like to think of as an interpretive or hermeneutical variant of law and economics.

2. Explicit purpose or goal

Statutes in environmental and natural resources law, legal areas that are intimately connected to, if not subsuming real property law, contain ambitious provisions about the goals and purposes of the promulgated written rules. The thought is that such explicit means-end rationality by statutory decree can direct and guide both discretionary decision-making under the statute, as well as the choice between alternative and contested interpretations in resolving disputes. The statute enabling the power market, for example, states that the purpose is to manage power resources in a "socially rational manner" (my translation), a term opportunistically chosen to soften a goal of economically efficient resource use, and thus make it politically easier to vote through.[2] The strategy succeeded, and an economic conception of energy law thus prevails.[3] The Petroleum statute is another piece of legislation that gives energy law a strong orientation towards promoting economic efficiency.[4]

Written real property law concerns mainly private management of resources related to land on the basis of property rights, most notably the position of the owner. Various extracts indicate that economically efficient land management is an important legislative rationale.[5]

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[2] Confirmed in private correspondence.
[3] Ot.prp. 43 (1989-90) Om lov om produksjon, omforming, overføring, omsetning og fordeling av energi m.m. (Energiloven) [Proposal regarding law of production, transformation, transmission, sales and distribution of energy (The Energy Act)] p. 25.
[4] Jorem, Henrik, Hensynet til ressursforvaltning i lovene om energiproduksjon til havs [Consideration of resource management in the laws on offshore energy production], MarIus 2024 No. 576, Scandinavian Institute of Maritime Law. https://www.sjorettsfondet.no/asset/journal/2024/576/Marius_576.pdf.
[5] See especially Lov 21. juni 2013 nr. 100 om fastsetjing og endring av eigedoms- og rettshøve på fast eigedom m.m. (jordskiftelova) [The Land Consolidation Act] Sec. 1 and 3, Lov 20. December 1996 nr. 106 om tomtefeste (tomtefestelova) [The Leasehold Property Act] Sec. 40, Lov 16. Juni 1961 nr. 15 om rettshøve mellom grannar (grannelova) [The Neighbour Law Act] Sec. 2, 10 and 11, Lov 18. Juni 1965 nr. 6 om sameige

However, the expert committee that suggested the law be codified in the 1950's and 1960's never proposed such an explicit statutory purpose, even though it had mentioned such a rationale in its preparatory works[6] on numerous occasions – in accordance with earlier claims in the relevant legal literature.[7]

The time may now have come for a renewed and more complete codification of real property law as modules for land-related resource management. Thus, there is, prima facie, a lot to be said for open statutory wording declaring economically efficient resource use as the overriding legislative rationale and purpose of the law. I will return to this idea below, after a brief account of three main rhetorical mechanisms that might help explain and operationalize such a legal policy goal or principle.

3. Rhetorical mechanisms

3.1 Endorsing what is mutually beneficial

A dominant idea in economics is that resources are scarce in relation to needs, desires and preferences. The goal is therefore to satisfy preferences to the greatest extent possible, using the least resources possible.[8] An ethical principle of sorts follows from this goal: a change for the better for at least one actor, that does not imply a change for the worse for another, should be endorsed (the Pareto principle).[9] This means that the basic tenets of private law – freedom of contract and the enforcement of reciprocal promises – form a foundation for legal reasoning that promotes efficiency – assuming tolerable externalities.

Written real property law mirrors this respect for mutually beneficial agreements by stating, first, that its statutory rules are gap-filling only, *i.e.* that the *actors can contract around* them. Admittedly, "unreasonable" reciprocal promises cannot be enforced. An important study indicates, however, that this criterion is largely used in a way that is consistent with economic reasoning based on efficiency criteria[10] Moreover, hypothetical bargaining outcomes guide

(sameigelova) [The Condominium Act] Sec. 3 and 4, and Lov 29. november 1968 um særlege råderettar over framand eigedom (servituttlova) [The Easement Act] Sec. 2 and 5-7.

[6] NUT 1957:3 Rådsegn 2 – Om eigendomsretten i grannehøve [Official Norwegian Report 1957:3 Proposal 2], p. 17; NUT 1959:4 Rådsegn 4 – Om sameige [Official Norwegian Report 1959:4 Proposal 4], p. 16; NUT 1960:1 Rådsegn 5 – Om særlege råderettar over framand eigedom [Official Norwegian Report 1960:1 Proposal 5], p. 35.

[7] Scheel, Herman, Forelæsninger over norsk Tingsret [Lectures on Norwegian real property law], 1. häftet, T.O. Brøgger 1912, p. 18 (see footnote/section 5 below); Borch, Karl, Det socialøkonomiske grunnlag for en partiell bruksrett er at bruken er til større nytte for bruksrettshaveren enn til skade for den eiendom bruksretten gjelder (den tjenende eiendom) [The socio-economic basis for a partial right of use is that the use is of greater benefit to the holder of the right of use than it is detrimental to the property to which the right of use applies (the servient property), Tidsskrift for rettsvitenskap (TfR) 1920 p. 289; Gjelsvik, Nikolaus (med Solem, Erik), Norsk Tingsrett [Norwegian real property law], 3 utg., Nikolai Olsens Boktrykkeri 1936 p. 465.

[8] Backhouse, Roger E. & Medema, Steve G., Defining Economics: The Long Road to Acceptance of the Robbins Definition. Economica 2009, 76(s1), pp. 805–820.

[9] Kaplow, Louis & Shavell, Steven. Fairness Versus Welfare, Harvard University Press 2002.

[10] Wilhelmsen, Trina-Lise, Avtaleloven § 36 og økonomisk effektivitet [Sec. 36 of the Contracts Act and economic efficiency], TfR 1995, pp. 1–246.

decisions, such as filling gaps in unspecified servitudes created by long-term use/adverse possession[11] and meting out damages in lieu of an injunction.[12]

Second, a source of real property norms that also supervenes its statutory rules, are so-called "particular legal circumstances" (in Norwegian *særlege rettshøve*), *i.e.* local patterns of resource use, common usage in the area and even special neighborhood characteristics. This polycentric mode of legal reasoning may be supported by Robert C. Ellickson's hypothesis about the trend towards efficient social norms in close-knit groups and Elinor Ostrom's evidence supporting the idea that local groups often best manage their own resources, even if they display characteristics of the "commons".[13]

3.2 Weighing interests by applying "guiding standards"

To what extent and how legal policy considerations – like a concern for economic efficiency – play a role in legal reasoning is of course dependent on the formal structure of the rules, i.e. the balance, as Carol Rose has put it, between crystal and mud. In real property law, we find both clear rules with bright lines, as well as balancing norms that require those who apply the law to exercise discretion with the help of "guiding standards".

A case could indeed be made for the former based on the ideals of private autonomy and predictability. Less discretion could create an impression of greater security for those regulated by the rules, which may be valued positively in itself. And if the initial allocation of rights and duties does not seem desirable under the regime in a given situation, the relevant parties could rationally adjust the situation by mutually beneficial agreements.[14] (see under section 3.1 above). In actual real property law, however, such rationality is often not assumed. Moreover, I think most real property lawyers would agree with Ronald Coase that friction, in the form of (other) transaction costs, often exists.[15] Indeed, based on my reading of Coase and of others on the implications of the Coase Theorem, I infer that, in such conditions, applying discretionary "guiding standards" may very well be the optimal norm structure, i.e. a case for mud is made.[16] Coase suggested this for nuisance law, and such principles in the law between neighbors do prevail. As further illustration, I offer two recent cases from the Supreme Court in Norway.

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[11] Falkanger, Thor & Falkanger, Aage Thor, Tingsrett [Real property law], 9 utg., Universitetsforlaget 2022, p. 388.
[12] Killingberg, Kristian Østberg, Ekspropriasjon av servitutter – Om ulikhetene mellom inngrepshjemlene og kompensasjonsreglene i servituttlova og i ekspropriasjonsretten [Expropriation of easements – On the differences between the grounds for intervention and the compensation rules in the Easements Act and in expropriation law] PrivIus – Journal of Private Law – Online 2024, nr. 223, p. 104.
[13] Ellickson, Robert C., Order Without Law: How Neighbors Settle Disputes. Harvard University Press 1991; Ostrom, Elinor, Governing the Commons: The Evolution of Institutions for Collective Action. Cambridge University Press 1990.
[14] Coase, R. H., The Firm, the Market and the Law. University of Chicago Press 1988, p. 97 ff.
[15] *Op.cit.* p. 114.
[16] *Op.cit.* p. 119; Mackaay, Ejan, Law and Economics for Civil Law Systems. Edward Elgar Publishing 2013, p. 218.

A very prominent and interesting case is HR-2022-1119-A *Trollvassbu.* Here, the parties were not neighbors, but instead a landowner claiming against the owner of a cabin on the parcel of land that belonged to the landowner.

The owner of the cabin had built it pursuant to an agreement with the state, who was thought to own the land at that time. However, uncertainty prevailed about who owned the land in the area. Later, the conclusion was reached that the land belonged to a local farmer, who sued the cabin owner and claimed eviction and ownership of the cabin, since it had been built on his land.

The Supreme Court considered whether Neighbour Law Act (Grannelova) Sec. 11 or Act on accidentally commingled property (lov om hendelege eigedomshøve) Sec. 8 should be applied. The Court summarized the sources of law in Sec. 44. While Sec. 8, which allocated cabin ownership to the farmer, applied directly to the case, neither the preparatory works of Act on accidentally commingled property nor those for the Neighbour Law Act restricted/prevented the possibility of applying Sec. 11. This section, though primarily intended to regulate a different situation, would have upheld the original cabin owner's rights provided generous compensation was paid to the true owner of the land.

Based on the legal and political justification for Sec. 11, the court decided that the rule could equally apply to this case. Because of this, it can be argued that the rule should have a wider area of application.

In this particular case, the rules are interpreted in a particularly purpose-oriented way – based on what appears to be reasonable and fair with regard to the result. The assessments authorized by the regulations are based on considerations of fairness and reasonableness.

Could this case be an indication that the rules, as expressed in the Neighbour Law Act, apply more as established principles than as individual rules? One can question whether legal practice is based on analogical inferences or whether it is a case of applying more independent non-statutory legal principles.

It can be argued that one should see the application of the law as a generalization from the solution in the Neighbour Law Act. Other case law substantiates this (see, for e.g., RG-1974-38, RG-1992-601 and RG-2007-1432).[17]

It is reasonable to see the rules in the Neighbour Law Act as an expression of more established principles that exist as "common law", rather than as narrow rules that can only be applied if the situation is directly regulated by neighbor law. This is particularly evident in the assessment of remuneration, which is based on considerations of reasonableness and fairness.

I will sketch my other example, *Stryken Bruk* (HR-2020-2186-A), more briefly. This was a case between a farmer and an industrial forester who possessed the right to transport timber

[17] For the endorsement of such a principle in a controversial Sami human rights case, see Bondevik, Jenny & Stavang, Endre, Remedying the Fosen 'accident' – Reflections on private law remedies in a wind mill project gone wrong, Nordic Environmental Law Journal 2023:2 (NMT2023nr2_publicering_Bondevik_Stavang.pdf) accessed December 2, 2025.

over the farmer's land. The transportation activity was quite intense and constituted an unlawful nuisance under servitude law, according to the Court of Appeal (Borgarting). However, this conclusion was overturned by the Supreme Court, on the basis that the Court of Appeal had not explicitly measured and evaluated the benefit to the industrial forester of restricting the activity (i.e. reduced costs of harm) *against* the (marginal) cost to the industrial forester of avoiding or reducing the harm. In other words, the Supreme Court was very close to insisting on a cost-benefit test of liability for not taking precautions to avoid the nuisance. In the subsequent decision by a lower court, the outcome was indeed that the servitude right of the industrialist was acknowledged only under the condition that cost-effective precautions (namely, investing in a better road over the farmer's land) were taken.

3.3 Internalization of harms and losses

In practice, liability rules in the form of economic compensation to the aggrieved party are the dominant form of protection of entitlements, and against harm and loss arising from infringements. By foreseeing such potential liability, the potential infringer will, if he minimizes his own costs, recalculate his own cost structures related to various courses of action, and thus internalize harms and losses, depending on the measurement of damages. Thus, liability rules may induce desirable behavior, both through a negligence (or analytically equivalent) threshold rule for triggering liability, and through absolute or strict liability.[18]

For a negligence (or analytically equivalent) threshold rule to function properly, the determination of liability must follow the pattern described in section 3.2 above. If this is done, socially desirable incentives may result, even if all harm and loss is not perfectly captured by the measurement of damages. The negligence (or analytically equivalent) threshold rule will nevertheless provide a clear signal concerning the desired behavior to the potentially liable party by creating a "kinked" cost curve structure.[19]

In contrast, the ability to fully capture harms and losses when determining damages is more crucial for economic efficiency reasons where the liability rule is absolute or strict, as it is in motor accident law, pollution liability and in takings law.[20]

Let me quote a translation from my own decision in an Appeals Court case on what is to be deemed compensable harm in a car accident case under a strict or absolute liability rule, where the victim both suffered loss of income as well as loss of future dividends from his own company, where he was a key resource:[21]

"According to the first Section 3-1 of the Norwegian Civil Liability Act, the compensation shall cover the damage suffered and the loss in future acquisition. In other words, A's financial loss shall be fully compensated. According to the second paragraph, it is crucial whether the damage prevents or reduces A's ability to earn income through his own work. The

[18] Eide, Erling & Stavang, Endre, Rettsøkonomi [The law and economics], 2. utg., Cappelen Damm akademisk 2018, p. 256.
[19] Cooter, Robert, Prices and Sanctions, Columbia Law Review 1984, 84(6), pp. 1523–1560, p. 1527.
[20] *Op.cit.* pp. 1528–1529.
[21] LB-2003-14218. I was one of the judges in a panel of three.

question is whether a distinction must be read into the provision between wage income and owner's income (dividends) with the consequence that A's expected dividend does not have protection under tort law. Since there is no decisive case law, the assessment must be based on the statutory text and the considerations that traditionally underpin the right to compensation. In light of A's key role in X AS, it is contrary to a natural linguistic understanding of the first and second paragraphs of the Norwegian Civil Liability Act, read in context, to distinguish between A's salary and his dividends. The Court of Appeal assumes that there is a close connection between A's personal efforts and the results of the company. The business has few fixed, non-operating costs. Although there are also other employees, the results undoubtedly depend heavily on A's working hours, creativity and personal commitment. The limited liability company appears as part of his overall income arrangement, and the dividends are almost by nature a return on the utilization of A's personal resources. The difference between salary and dividends therefore appears, considered on the basis of the wording of the Damages Act, Section 3-1, to be very small.

The core of the law on damages is that the injured party should not be worse off financially from the damage than if it had not occurred. The consideration of recovery indicates that the productive earning capacity is protected and, in a case like A's, speaks against a distinction between loss of salary and loss of ownership income. Since the lawsuit brought by X AS is subsidiary, there is no risk of double compensation in this case, but the Court of Appeal cannot see such a danger in other cases either.

A distinction between loss of salary and lost dividends in such a case also goes against the desire to prevent damage. For IF [the insurer], the distinction would imply that A's choice of income arrangement provided an incidental advantage. But if such arrangements are or become common, the distinction would also easily reduce the signals that the compensation claims give to potential tortfeasors, including via premiums and other insurance terms.

IF [the insurer] argues that if A, as a shareholder, is entitled to compensation for a loss that occurs in the limited liability company X AS, this would lead to legal and calculation difficulties. However, the Court of Appeal cannot see any greater problems than must be expected in the practical handling of the basic conditions of the right to compensation.

Overall, the wording of Section 3-1 of the Damages Act and key real considerations speak quite clearly against denying A's expected dividend protection under the law of damages, while opposing considerations lack weighty evidence. The conclusion is therefore that a distinction between salary and expected dividend with effect for A's claim cannot be read into Section 3-1 of the Damages Act. Such a solution is consistent with views in the legal literature, see in particular Nygaard (2000, p. 97)[22]."

The court unanimously justified the award of full damages based on the above reasoning, where internalization logic (inspired by law and economics reasoning) clearly mattered substantially. However, the decision was overturned by the Supreme Court in Rt. 2004 p. 1816 with three votes to two. The majority noted the Appeal Court had worded its reasoning in a "foreign-sounding way" – and limited the compensation to loss of salary. But later policy

[22] Nygaard, Nils, Skade og ansvar [Damages and Liability], 5. utg., Universitetsforlaget 2000, p. 97.

reports indicate that the legislator is likely to correct the statutory wording and thus implement the Borgarting rule.[23]

The example above might suggest that traditional lawyers (*e.g.* in private law) see internalization reasoning as a form of social engineering mostly congenial to the legislator. And indeed, this Pigouvian logic prevails first and foremost in issues of taxation and areas like carbon pricing, where the legislator does indeed dominate completely. Yet, in a very recent nuisance case, the Supreme Court stated that it considered it socially desirable that the legislator align noise pollution liability law more with welfare economics considerations, consistent with the internalization mechanism, to promote economic efficiency (see HR-2024-1717-A).

In this case, the state as road owner and responsible for substantial construction works, was relieved of liability for losses caused by very substantial noise pollution over a period of 8 years. It was clear that the nuisance exceeded the liability triggering threshold, but the Court reasoned that there was no compensable loss, given that the severe reduction in market prices for neighboring property was only temporary – even if substantial Thus, only property owners selling or renting out with a proven loss could claim economic compensation. However, the Court suggested that the legislator should modernize the noise pollution liability rules in accordance with "hedonic pricing" methods (although not exactly in these words) for the measurement of damages. This is precisely what the internalization mechanism for economic efficiency suggests.

My final argument for the proper use of internalization reasoning to cater for efficient use of scarce resources (or in favor of such a rationale) turns to takings law, and its constitutionally stated ideal and imperative, which requires "full" economic compensation of the owner of the expropriated property.

This ideal of "full" compensation for takings, even legal ones, was stated in the 1814 Constitution and applied to the then-economically weak government as a potential taker of property; it is also currently accepted in Norway as the enforceable takings law. "Full" compensation requires the application of the "with or without" difference principle as a method for calculating the takings compensation award for the so-called economic loss suffered. This method is criticized by some analysts for treating public sector entities like cost-minimizing firms. However, our "full" compensation rule deems it desirable to give those with taking powers a necessary incentive to only take property by force, and put such property to other use, under conditions that increase the social utility of using the resources according to the taker's preferences. Thus, the rationale for the rule seems to be – if we adopt this rather simple (and positive) explanatory mode of reasoning – that compensation at a price lower than "full" compensation would result in too many takings. Assuming there is a risk of governmental "fiscal illusion" in public takings, or a tendency toward cost-minimization in private takings, this rationale appears to be grounded in reasoning consistent with the perspective of welfare economics, as articulated and refined in the nearly canonical law and economics literature on precautionary models.

As a matter of legal theory, of course, one might think, even in such models, that the courts could review the taker's balancing of interests and invalidate takings that do not meet a cost-

[23] Norges offentlige utredninger (NOU) [Official Norwegian Report] 2011:16 section 5.2.4.7.3.

benefit test. However, the courts lack both the skills, the courage, and the statutory and doctrinal bases to perform such a role. In practice then, takings law amounts to a doctrinal body of norms affecting the assessment of "full" damages. This is, in my opinion, a powerful example of the real property law function of the internalization mechanism discussed herein.

I will come back to this explanatory (positive) reasoning about the function of takings law in sections 3.4 and 5 below. For now, I will offer my views on the contested doctrinal choice in takings law currently being litigated, namely, the proper interest rate when calculating the net present value of lost future earnings from expropriated real property. Should the baseline rate be 2.5%, as in personal injury statutory law (e.g. auto accident cases), or 4%, the Supreme Court's preferred rate for takings involving, for example, farm or forest land, despite the lack of legislative support?

In my opinion, as I have argued elsewhere, a baseline rate closer to 2.5% is appropriate, for both doctrinal and legal policy reasons, when internalization concerns are applied.[24] 4% is more than what is expected as a real rate of return from our Sovereign Wealth Fund. And 2.5% is slightly more than the real rate of return on the type of agricultural property that was taken in the case under review. I think that this was a test case for whether the Supreme Court had the courage and integrity to use the internalization mechanism set out here to ensure respect for economic efficiency. As demonstrated very recently, however, it did not, and upheld the previously preferred real interest rate of 4 %, see HR-2025-2364-S. (more on this in sections 3.4 and 5.2 below).

3.4 Mechanisms or modules?

In the previous sections, I outlined three patterns of legal reasoning that align with economic efficiency. I refer to these as "mechanisms" – explanatory building blocks that help make the intent to achieve effects consistent with welfare economics more credible. My ambition is thus to be sensitive to Jon Elster's critique of functional explanations in the social sciences.[25] He argues that the expected effects occurring after the event to be explained (the explanandum) cannot themselves serve as the explanation (the explanans) unless supported by credible explanatory mechanisms, such as natural selection in biology, or rational choice and other purpose-oriented explanations in the social sciences.[26]

Alternatively, one can adopt a systems theory perspective, as proposed by Henry E. Smith, and view the three patterns of legal reasoning set out above as "modules".[27] The concept of "modules", as I understand it, refers to semi-autonomous building blocks within a system, each with potential emergent effects (when combined with other modules) that cannot be directly observed within any specific module. It may be that legislators or judges operating within the patterns sketched above were motivated by moral views other than those implicit in welfare economics. But if this is the case, it is possible that the system as a whole may

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[24] Stavang, Endre, Tendensen til verdiskaping i fast eiendoms tingsrett [The tendency towards value creation in real estate property law], Tidsskrift for eiendomsrett [Journal of Property Law] 2025, 21(1-2).
[25] Elster, Jon, Nuts and Bolts for the Social Sciences, Cambridge University Press 1989, chapter one.
[26] See also Føllesdal, Dagfinn & Walløe, Lars, Argumentasjonsteori, språk og vitenskapsfilosofi [Argumentation theory, language and philosophy of science], 7. utg., Universitetsforlaget 2000, p. 128.
[27] Smith, Henry E., Property as the law of things, Harvard Law Review 2012, 125(7), pp.1691–1726.

produce emergent efficiency effects supported by an ethical overlap between welfare economics and these seemingly rival moral visions. My admittedly simple and crude reasoning around full compensation for takings, discussed in section 3.3 above, might, for example, be reinforced by a sense of justice: that full compensation represents a means of balancing an ethical equilibrium disturbed by the use of force, even if that force is legal, as in most takings.

To elaborate, let me clarify how overlapping (ethical) support for the full compensation requirement may play out in practice.

As mentioned, the Norwegian takings regime requires full compensation, conventionally assessed by the "with or without the taking differential method". Economically, this rule is typically justified, or explained, as a cost-internalization device: by obliging the taker to bear the full market value of expropriated property, the law ensures that takings occur only when social benefits exceed social costs, thereby promoting Kaldor–Hicks efficiency.

Because the taker is usually a public authority, however, this incentive-based rationale is not necessarily entirely convincing. Governments do not operate as profit-maximizing agents, and administrative processes already contain mechanisms for balancing public and private interests. The persistent normative appeal of full compensation thus invites a complementary justification in terms of corrective justice, as developed in the Aristotelian tradition and modernized by Weinrib and Coleman.[28]

In sum, the Norwegian full compensation principle may rest on a dual foundation. Its economic function is to ensure socially efficient takings, while its moral function is to restore equality between the public and the individual whose property is taken. The overlap of incentive logic and corrective justice thus provides a coherent and empirically testable justification for the robustness of full compensation in practice.

I leave further theoretical musings and the choice between a mechanism or a module perspective to the reader, or to another occasion.

4. Proposal

Based on the above, my claim is that there is a basis for moving real property law from implicit to explicit recognition of the justificatory role of economic efficiency as a tool and criterion – as in market law, (other) natural resources law and tax law. In addition to having been on the brink of explicit recognition, recent experience and observations support an "as if" interpretation

Against this backdrop, I propose that a new consolidated real property law statute explicitly declare economic efficiency as a/the main rationale for the rules. In my mind, such a codifying proposal would have both positive support and normative appeal. Furthermore, it might yield practical, academic gains by bringing lawyers and economists closer together,

[28] Weinrib, Ernest Joseph, The Idea of Private Law. Harvard University Press 1995; Coleman, Jules L., Risks and Wrongs. Cambridge University Press 1992.

potentially resulting in progress through collaboration and the expansion of interdisciplinary projects. Adding variables to the Social Welfare Function might be one such ambition, for example. Indeed, perhaps such a development in real property law could stimulate the integration of economics into private law more generally?

5. Discussion

5.1 Use of the term "welfare"

I would like, first, to defend my use of the term "welfare" in the title of this paper, in which I use efficiency-oriented legal analyses to justify a proposal that a future codifying legislator now has legal reasons, at least in Norway, to declare economic efficiency as a, or perhaps even *the* main purpose of written real property law. Such use of language and choice of terminology is consistent with influential and widely read books, such as *Welfare versus Fairness* and *Social Efficiency: A Concise Introduction to Welfare Economics*.[29]

5.2 Errors in the understanding of economic efficiency

Let me move to a potentially more serious charge, namely, that I have, in this paper, glossed over technical definitions and analytical distinctions that a professional economics scholar would consider important in giving meaning to the idea of economic efficiency in law. As a result, my analysis might lack both nuance and precision when shifting from (positive) legal analysis to (normative) policy-oriented work.[30]

This charge actually strengthens the case for a stronger role for economists, as I argue in section 4 above. When writing from an "internal" standpoint, albeit drawing on an "external" economics perspective, a lawyer like me risks treating economics too crudely, especially when reasoning in an explanatory (positive) mode, as in section 3 above. If my proposal were to be accepted, however, and economic efficiency were to become the primary rationale for real property law, lawyers and economists would find themselves collaborating closely while upholding their respective professional standards and best practices. One particularly practical and consequential implication of such a development, I think, would be to "overrule" the Supreme Courts very recent choice of 4 % real interest rate in expropriation cases, see under section 3.3 above.

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[29] Kaplow & Shavell 2002 (see fn 9 above); Bohm, Peter, Social Efficiency: A Concise Introduction to Welfare Economics, 2. ed., reprint, Macmillan 1992.

[30] *E.g.* the rationalization of a full compensation for takings rule, as in section 3.3 above, is qualified and made more nuanced in Levinson, Daryl L., Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, University of Chicago Law Review 2000, 67(2), pp. 345–420.

5.3 Disregard for sustainability

Yet another potential concern – particularly for lawyers keen on incorporating environmental interests, rights and concerns – would be to ask: What about sustainability as a possible societal goal?

In Norway, statutes on planning, pollution and biodiversity already incorporate sustainability principles. In addition, a constitutional provision asserts the right to a healthy environment and sustainable development (including the protection of future generations). None of this is affected by my proposal, so there seems little cause for concern in terms of the incorporation of sustainability reasoning. Moreover, I perceive preference satisfaction to be subject to overlapping support from both economic efficiency and sustainability: the latter is simply the former in the (very) long run, as I read the definition of sustainable development contained in *Our Common Future* (World Commission on Environment and Development, 1991).

5.4 Confirmation bias

My next anticipation originates from the charge of bias that Arthur Leff (1974) once raised against Richard Posner for displaying 400-page tunnel vision in his first edition of *Economic Analysis of Law* (1973).[31] Might this paper be seen as displaying an analogous type of confirmation bias or selective perception?

Over the years, I have rarely encountered plausible counterexamples and counterarguments based on real property law in Norway, besides one unrealistic hypothetical from a friendly colleague, and a quite dramatic but rather irrelevant attack on law and economics in general by a Marxian sociologist, to which I have already responded.[32]

One exceptional counterexample to my positive analysis in this paper is the law of information concerning land parcels and other types of assets subject to real property law – and in particular the rules on the legal implications of (electronic) registration in the relevant database, as regulated by the Land Registration Act. These rules about which parties win when rights collide as a result of conflicting transactions, etc, are, in Carol Rose's terminology, much more of the "crystal" type than the "mud" type (illustrated with examples from practice in section 3 above). Moreover, current doctrinal literature rarely invokes an efficiency rationale to dogmatically explain such rules of "extinguishing of rights when these collide". Thus, this body of real property law and its doctrinal rationalization might justify a request for exempting the chapters on these rules from my proposed legislative declaration in a modern, codified real property law.

However, I see little harm in including statutes on real property information under the umbrella of my proposed declaration of an economic efficiency purpose. Such rules have historically been seen as functional in a kind of utilitarian sense, and government documents explicitly state this, even now. Perhaps these "crystallized rules" and their somewhat narrow

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[31] Posner, Richard A., Economic Analysis of Law, Little Brown and Company 1973. *Cf.* Leff, Arthur Allen, Economic Analysis of Law: Some Realism about Nominalism. Virginia Law Review 1974, 60(3), pp. 451–482.
[32] Stavang, Endre, Legal Economics: How Cautious Should Lawyers Be?, Working paper 3 (Law and Economics) 1996.

rationalization can be understood as modules in a system of real property law that promotes economic efficiency as an emergent effect (cf. section 3.4 above, where I leave such an inquiry to others, or to another occasion).

5.5 Does it travel?

As a final discussion point, I would like to address whether focusing on a particular national jurisdiction – such as Norway's – can offer insights for other jurisdictions, particularly in Europe, when civil law including real property is codified. In presenting this legal policy proposal to a potential future codifying legislature, I hope at the least to have provided a thought-provoking case study. At the same time, I fully recognize that what is natural or appropriate in one jurisdiction – to articulate a (principal) goal for written civil law – requires careful consideration before it is integrated into other domestic legal cultures. The question of whether such instrumental rationality is appropriate at all should also be part of the discussions. Here, I affirm the importance of respecting nation-state sovereignty with respect to real property law, as reflected in Article 125 of the EEA Agreement and in the corresponding provision of the EU Treaty.

6. Closing remarks

In closing, let me offer a methodological remark, which may shed light on my hopes for the future of law and economics as a fruitful source of research agendas between or across the science of economics and (other) legal sources-based scholarship. The type of law and economics that I tend to endorse – as reflected, to some extent, in this paper – is a hermeneutical or interpretive law and economics. As a method of legal science, this type of interdisciplinary legal analysis entails an iterative and reflective search for law and its interpretation. The idea is that one should move from legal sources to models of (and reasoning around) their social desirability, and back again, iteratively, while keeping in mind that neither of the two vantage points – whether the "internal" or the "external" – is normatively superior. Rather, as Guido Calabresi insists, the two should be seen as adjustable during the process.[33] If this is so, striving for "reflective equilibria" between law and economics is a promising way forward – especially, but not exclusively, for real property law.

[33] Calabresi, Guido, The Promise and Peril of "Law and..." Columbia Law Review 2024, 124(5), pp. 1269–1293, p. 1271.