

COMPARATIVE PROPERTY LAW: COLLECTIVE RIGHTS WITHIN COMMON LAW AND CIVIL LAW SYSTEMS

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I. INTRODUCTION

The starting point for any discussion about comparative property law between a common lawyer and a civil lawyer must be the fundamental difference between our concepts of ownership. Where the civil law sees ownership as an absolute and unitary concept, for most common lawyers it more closely approximates to a 'bundle of rights'.¹ The difference between the two concepts is radical and, some would say, characteristic of the differences between the two types of legal system. Civil law ownership is central to a concept which shaped the structures of the emerging market economy in the 19th century. Rooted in the Kantian idea of property as bastion of individual freedom (detached from feudal obligations), it turned out to be a suitable point of departure for a legal thinking that had resort to a scientific understanding of a "legal logic" and was in quest of principles and coherent structures. In contrast, in common law systems the idea of ownership as a unitary concept has a secure and central role in the non-legal world,² but it has

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¹ *U. Mattei*, Basic Principles of Property Law: A Comparative Legal and Economic Introduction, Westport/CT/London: Greenwood Press, 2000, pp. 77-78; *S. van Erp*, Comparative Property Law, in: M. Reimann/R. Zimmermann (eds), Oxford Handbook of Comparative Law, Oxford: Oxford University Press, 2006, pp. 1055, 1060. The 'bundle of rights' view of ownership is generally but by no means universally accepted in the common law world. Its modern genesis is usually taken to be *T. C. Grey's*, The Disintegration of Property, in: J. R. Pennock/J. W. Chapman (eds), Property: NOMOS XXII, New York: NYU Press, 1980, p. 69, whereas its antithesis, the absolute dominium analysis, is generally attributed to Blackstone, who in two William Blackstone, Commentaries 2 describes property as "that sole and despotic dominium which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe". But as pointed out by, amongst many others, *C. Rose*, Canons of Property Talk, or, Blackstone's Anxiety, 108 Yale Law Journal 1998-1999, p. 601, not even Blackstone himself regarded this as unqualifiable; and see also *M. Davies*, Property: Meanings, Histories, Theories, Oxford: Routledge-Cavendish, 2007, pp. 18-21, making a similar point from a different perspective. *G. S. Alexander* charts the twentieth century shift from this to the "disaggregated, more explicitly social 'bundle of rights' conception", in *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776-1970*, Chicago/London: The University of Chicago Press, 1997, pp. 319-329 and pp. 381-382.

² A mismatch noted by, amongst others, *S. R. Munzer*, A Theory of Property, Cambridge: Cambridge University Press, 1990, p. 16; *J. Waldron*, The Right to Private Property, Oxford: Clarendon Press, 1988, p 27; see also *J. R. Nash*, Packaging Property: The Effect of Paradigmatic Framing of Property Rights, 83 Tulane Law Review 2008-2009, p. 691, whose study on the reaction of newly enrolled students provided with laptops challenges the strength of the hold the absolute dominium paradigm has, at least on US laypeople, and

little basis in legal reality. It is one of the first things that a law student has to unlearn. For common law lawyers, ownership – when it exists at all – lies within a pragmatically developed spectrum of proprietary relationships, each of which has its own configuration of rights and duties distributed between the parties to the relationship. The concept of ‘absolute’ ownership exists, in the sense that all the proprietary rights in respect of a resource *may* be concentrated in the hands of a single rights-holder, to whom the rest of the world owes duties not to intervene, but this need not happen. Even when it does, although the relationships that then arise in respect of that resource differ from other proprietary relationships that could equally well arise, the difference is one of degree only, not one of kind.³ This ability to fragment ownership of a resource and distribute the constituent rights and duties between different right-holders allows the common law to achieve a more transparent balance of power in relation to the resource than the civil law can. It also, however, has a price. We have already noted the mismatch in the common law world between what lawyers think property is and what everyone else – everyone else sometimes including economists – thinks it is. This provides fertile ground for misunderstanding. Further, and not unconnectedly, there is an inevitable tension between fragmentation and *numerus clausus*, an issue we pursue below.

However, the emphasis in this Chapter is not on this fundamental difference between our property systems but rather on an important characteristic which we share and which divides us from much of the rest of the world. Transcending our conceptual differences we share a central focus of individualism. Whether we are talking about civil law unitary ownership or common law fragmented property rights, the basic unit of rights-holding is the individual, whether in human or in corporate form. Both civil law and common law also accommodate with little difficulty varying forms of state ownership and co-ownership⁴, and also forms of group rights-holdings where an individual property owner is bound by contract or property rules to hold the resource on behalf of others. But it is individualism which is the central organising concept. For differing reasons, both common law and civil law have come to have considerable difficulties in accommodating the idea of collective rights, where the rights-holder itself is a community of people, whether determinate or indeterminate, defined by reference to some common

suggests that the paradigm by which property rights are framed – i.e. ownership as either absolute dominium (what he calls the “discrete asset” paradigm) or as a bundle of rights – has an effect upon whether and how much lay people accept interference with and regulation of those rights (more inclined to do so if provided with a bundle of rights paradigm).

³ For the distinction between ‘property’ and ‘ownership’ see *A. Clarke/P. Kohler*, *Property Law: Commentary and Materials*, Cambridge: Cambridge University Press, 2005, p. 180; *J.W. Harris*, *Property and Justice*, Oxford: Clarendon Press, 1996, pp. 140-142; *C.P. Rodgers*, *Nature’s Place? Property rights, Property Rules and Environmental Stewardship*, 68 *Cambridge Law Journal* 2009, pp. 552-554; *D. Lametti*, *The Concept of Property: Relations through Objects of Social Wealth*, *Univ. of Toronto L J* 2003, 325-378 (pointing out also the general tendency to equate ‘property’ with ‘private property’).

⁴ See further below.

characteristic such as kinship, locality or community.⁵ It is true that both the civil law and English common law emerged (in very different ways) out of feudalism, in which collectivism was inherent. But once each had discarded its feudal past, civil law and common law responses to collective property rights have tended to be wholly negative, sometimes denying them recognition altogether, sometimes simply ignoring them.⁶ In the case of English common law, even when the legitimacy of a few residual collective property rights was reaffirmed in the modern law by first the Commons Registration Act 1965 and then the Commons Act 2006, it was done in such a way as to isolate these rights from the mainstream of property rights, as we see later.⁷

However, developments over the last few years have demonstrated that such responses are no longer sustainable. The parallel processes of privatisation and globalisation have brought individual property rights and collective property rights into closer juxtaposition. This internationalisation calls into question central dogmas in property theory about the form and function of property rights, and how property rights function to achieve societal goals. Specifically, it raises two questions. First there is an initial question of immediate social, economic and political importance: in situations where individuals and communities each have legitimate claims on the same resource, can those claims each be given legal recognition on equal terms? This in turn leads to a second and more ambitious enquiry: might more complex property rights systems that successfully accommodate the claims to scarce resources of both individuals and communities actually have positive advantages over monolithic private property rights systems, whether of the civil law or of the common law variety? In particular, might these complex property systems, giving equal weight to collective and individual interests, actually be better suited also to serving the public interest in those resources?

The limited object of this paper is to highlight three areas in which these questions are raised. In the first two of them (Sections IV. and V.) the questions arise because of the emergence or re-emergence of collective property claims within a private property or state property framework. The first of these, outlined in Section IV., is the recognition of local collective rights to use or control natural resources. The second (Section V.) is the recognition of indigenous and minority land rights in countries which have, or aspire to have, an economic system geared towards freely marketable property rights. The third area, the development of property rights in

⁵ See further below; on community v individualism see *L. Green*, *Legality and Community*, 5 *Oxford Journal of Legal Studies* 1985, p. 463, reviewing *T. O'Hagan*, *The End of Law?*, Oxford: Basil Blackwell, 1984; *J. S. Auerbach*, *Justice without law? Resolving Disputes without Lawyers*, New York: Oxford University Press, 1983; see also *T. E. Scrutton*, *Commons and Common Fields*, Ontario: Batoche Books, 2003 (originally published 1887), p. 7.

⁶ The English Land Registration Acts 1925 and 2002 provide good examples of the latter; the appraisal by the Supreme Court of the Northern Territory of Australia of the nature of the relationship between the indigenous peoples of that Territory and their land in *Milirpurn v Nahalco Property Ltd* (1971) 17 FLR 141 illustrates the former.

⁷ Section III. below.

China (Section VI.), is one we select because here the situation is reversed. In China the government is seeking to find a place for private property rights within a communist system which will allow private property to flourish without prejudicing the integrity of the communist system.

However, before expanding on these three areas there are some introductory matters. First, we need to look more closely at the reality of the apparent distinction between civil law unitary ownership and common law fragmentation. We do this by examining, in Section II., how far the *numerus clausus* principle operates as an effective bar to the broader recognition of collective rights in German and in English domestic law. In Section III. we then explain more fully what we mean by collective or communal rights, distinguishing them from co-ownership and also from what we loosely called 'group' ownership, where there are collective interests but they are represented by a single individual. We also outline in Section III. the present scope of collective ownership and collective property rights in German and English domestic law.

II. *NUMERUS CLAUSUS* IN THE CIVIL LAW AND COMMON LAW

At first sight the *numerus clausus* principle might seem to preclude, or at least severely hamper, any attempt by civil law and common law property systems to enlarge their recognition of collective property, especially in the novel areas noted in Sections IV.-VI. A central dogma for both civil law property and common law property is the existence of a *numerus clausus* principle,⁸ even if within the civil law its effect is to underpin the idea of unitary ownership, whereas in the common law it can more easily be seen as a principle limiting the scope of fragmentation of ownership. However, whilst comparative lawyers may still stress this difference, reality has swept away categorical differences. The "Anwartschaftsrecht" is by far the best known example of "relational property" outside the German *numerus clausus*. The German Supreme Court ("Reichsgericht" [RG] at that time) did not accept it and therefore it was not adopted as "a right" in the Civil Code (BGB; Bürgerliches Gesetzbuch); only the right to retain property was codified, as a category of contract law. Thus the property implications were downplayed. However, as to be expected, the topic soon re-emerged, and the Reichsgericht accepted the expectation to get property as a property interest in the context of the "Sicherungsübereignung" (timely limited transfer of property transfer as security)

⁸ B. Rudden, Economic Theory v. Property Law: The Numerus Clausus Problem, in: J. Eekelaar/J. Bell (eds), Oxford Essays in Jurisprudence: Third Series, Oxford: Oxford University Press, 1987, p. 1; H. Hansmann/R. Kraakman, Property, Contract, and Verification: The numerus clausus problem and the divisibility of rights, 31 Journal of Legal Studies 2002, pp. 373-420; S. Hepburn, Carbon Rights as New Property: Towards a Uniform Framework, 31 Sydney Law Review 2009, pp. 239-271; T. Merrill/H. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 Yale Law Journal 2000, pp. 1-71; H. Smith, Community and Custom in Property, 10 Theoretical Enquiries in Law (5) 2009, pp. 5-41.

soon after the BGB was issued.⁹ The post war Supreme Court (“Bundesgerichtshof” [BGH]) followed suit.¹⁰

As for the common law, whilst the *numerus clausus* undoubtedly operates to some extent,¹¹ it is rarely articulated judicially,¹² and Parliament does not appear to regard itself as bound by it at all, or even to be aware of its existence.¹³ Nevertheless, common law courts are called upon with surprising frequency to decide whether or not to recognise new property rights, whether by acknowledging new ways of fragmenting the ‘ownership’ bundle, or by recognising proprietary rights in hitherto unpropertised things. They do not often decide in favour of recognition,¹⁴ but it says something for the comparative weakness of the *numerus clausus* principle that they agonise over the decision at some length and that the reasons they give for *not* recognising the new interest are overwhelmingly pragmatic.¹⁵ Cases concerning the proprietary nature of a particular right are rarely decided by explicit reference to the *numerus clausus* principle.

More importantly, in the common law the tolerance of fragmentation has, if anything, increased rather than decreased. At one time it was commonplace to say that fragmentation of ownership applied only to land and that ownership of goods was unitary and indivisible.¹⁶ If that was ever true,¹⁷ it is certainly not a sustainable

⁹ RG, decision of 8 Nov. 1904, RGZ 59, 146.

¹⁰ BGH, decision of 27 March 1968, BGHZ 50, 45– *Fräsmaschinenfall*.

¹¹ As *B. Rudden*, *Economic Theory versus Property Law: The Numerus Clausus Problem*, in: J. Eekelaar/J. Bell (eds), *Oxford Essays on Jurisprudence*, Oxford: Oxford Univ Press, 3rd ed., 1987, p. 234, points out there is a definitive list of property interests recognised in English law, and it is remarkably similar to most civil law systems’ lists.

¹² The rare exception is in the seminal case of *Hill v Tupper* (1863) 2 H&C 121, 159 ER 51.

¹³ New rights introduced by Parliament which have the essential characteristics of property rights even though not explicitly described as such by statute include statutory tenancies for holding over tenants, first introduced by the Landlord and Tenant Act 1913, and rights of spouses and civil partners to occupy their matrimonial/civil partnership home owned by their spouse/partner, first introduced by the Matrimonial Homes Act 1967 after the House of Lords refused to recognise such rights as property rights in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

¹⁴ The most far-reaching case is *Tulk v Moxhay* (1848) 2 Ph 774 (negative obligations towards neighbouring land held to be enforceable not only in contract but also in property, by the owner for the time being of the benefitted land, as against the owner for the time being of the obligor’s land). The most striking modern examples are *R. v. Kelly* [1999] QB 621, Court of Appeal (deciding that a hospital had property rights in preserved body parts stored in its laboratories, and therefore an unauthorised taker was guilty of theft) and *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 (men had property in their sperm stored by a hospital, and therefore could bring an action based on damage to property against the hospital when the storage system failed and the sperm was destroyed).

¹⁵ *Hunter v Canary Wharf Ltd* [1997] AC 655 (no property right to receive television signals); *Bradford Corporation v Pickles* [1895] AC 587 (no property in groundwater); *Rhone v Stephens* [1994] 2 AC 310 (positive obligations towards neighbouring land are enforceable in contract only, not as property rights).

¹⁶ It was said to follow from the fact that the doctrine of estates did not apply to goods, from which it was concluded that ownership of goods could not be divided into time slices. *R.*

proposition now. So for example, after strong resistance, it is now accepted that bailments of goods are proprietary.¹⁸ Similarly, it was once said that the rule that a contractual right to acquire a property interest in an asset in the future confers on the right holder an immediate proprietary interest in the asset, was a special rule applicable only to land. However, the courts have now confirmed that it is a general property rule *prima facie* applicable to all assets except goods, and that the contrary rule applies to goods only because of the special provisions of the Sale of Goods Act 1979.¹⁹

So, whilst the *numerus clausus* principle does form some sort of barrier in the way of progress towards a broader recognition of collective rights in both the German and the English systems, it is by no means insuperable in either.

III. COLLECTIVE PROPERTY IN GERMAN LAW AND IN ENGLISH LAW

1. WHAT IS COLLECTIVE PROPERTY?

The terms ‘collective property rights’, ‘collective property’ and ‘collective ownership’ are used here to refer to what might be described as limited access communal property.²⁰ In limited access communal property, ownership-type rights over a resource, or the exclusive right to make a particular use of that resource, are exercisable by (and only by) those who are members of a specified group. In other words, as noted below, each member of the group has a right not to be excluded from the resources, but also a right to exclude everyone else except a fellow member of the group. The group is characteristically defined by reference to the holding of a specific attribute. This attribute is most usually membership of a particular tribe or kinship group, or residence in a particular area, or the holding of a common characteristic, but it might be something else, such as ownership of appurtenant (i.e. benefitted) land. Most (although not all) ‘rights of common’ in English law fall within this last category. In English law a right of common is a right, exercisable in common with others having a like right, to take a natural

Chambers, Conditional Gifts, in: *N. Palmer/E. McKendrick* (eds) *Interests in Goods*, London: LLP 2nd ed. 1998 429 at p. 430 demonstrates the falsity of the conclusion.

¹⁷ For example, it has always been possible to hold goods on trust, and hence for legal and equitable interests to exist simultaneously, and for the ownership of goods to be split between the mortgagee and the holder of the equity of redemption.

¹⁸ *Yeanworth v North Bristol NHS Trust* [2009] EWCA Civ 37; see also *The Pioneer Container* [1994] 2 All ER 250, PC; *Bristol Airport v Powdrill* [1990] Ch 744.

¹⁹ *A. Clarke/P. Kohler*, supra fn. 3, pp. 472–473; confirmed by *International Finance Corporation v DSNL Offshore Limited & Orsin* [2005] EWHC 1844.

²⁰ *A. Clarke/P. Kohler*, supra fn. 3, p. 39; limited access communal property is sometimes referred to as ‘restricted access’ or ‘closed access’ communal property; see further *M. Davies*, supra fn. 1, pp. 63–76, on limited access commons, contrasting with public domain (open access commons), also tracing the history of enclosure of the commons and discussing the extent to which this represents a move from communalism to individualism, and making parallels with intellectual property; also *J. Cahir*, *The Withering away of Property: The Rise of the Internet Information Commons*, 2 *Oxford Journal of Legal Studies* 2004, pp. 619–641.

resource from someone else's land (the 'burdened' land).²¹ Fishing rights, hunting rights and rights of pasture held collectively come within this category.²² Rights of common may be free-standing ('in gross') or appurtenant (i.e. intended to benefit other land owned by the right-holder). A right of common that is 'appurtenant' is exclusively attached to the ownership of the benefitted land held by the right-holder, rather than attached to the right-holder personally, so that the right-holder cannot dispose of the right of common separately from the ownership of the benefitted land.²³ So, for example, rights to graze sheep on land owned by one person (the 'burdened' land) might be held by a community consisting of the landowners for the time being of all the farms surrounding that land. If their grazing rights are 'appurtenant', none of these farm owners can sell their grazing rights without also selling their farm to the same buyer at the same time. By the same token, any sale of a farm will automatically transfer to the buyer the grazing right.²⁴

It is even possible, although unusual, for there to be no eligibility criteria for attaining membership of a limited access community. In these cases the rights to make communal use of the resource are exclusive to members of the group, but anyone can become a member of the group by buying a right, so the holding of the right becomes itself the eligibility criterion. An example in English law would be rights of common that are 'in gross' rather than 'appurtenant', where the rights are all exercisable over the same piece of land, although each of the rights is held by a different person.²⁵ As already noted, these are rights of common which are free-standing, in the sense that the right-holders are free to sell the right whenever they want, to whoever they want. In other words, everyone in the world is *eligible* to hold a right. The community then consists of all those people *who do in fact hold those rights* exercisable over that land. So, for example, several different people might have rights, exercisable in common with each other, to catch fish in a lake, or graze horses on a field, and those rights might be freely assignable to anyone else. The people who for the time being are the holders of those rights form a community in the sense that they have inter-dependant rights in the shared resource.

These last two categories of limited access communal property – where the criterion for membership of the community is the ownership of neighbourhood land, and where there is no criterion for membership other than acquisition of the

²¹ *J. Farrand/A. Clarke*, Emmet & Farrand on Title, London: Sweet & Maxwell, looseleaf para 1.127 et seq.; see also *E. H. Burn/J. Cartwright*, *Cheshire and Burn's Modern Law of Real Property*, Oxford: Oxford University Press, 17th ed., 2006, p. 640.

²² In the case of rights of pasture, the natural resource taken is vegetation on the burdened land, and the taking is via the mouth of the grazing animal.

²³ This is ancient and complex law. Some categories of appurtenant right are 'severable', i.e. the right holder can dispose of the right separately from the ownership of the benefitted land, and once that has been done, each can be traded separately. Other categories are not severable.

²⁴ See further below.

²⁵ Another example, discussed in more detail in the text to footnotes 33 and 34 below, is an unincorporated association formed by its members to pursue a common purpose, either self-interested (for example a sports club) or philanthropic (to prevent cruelty to animals).

right to make collective use of the resource – are therefore a curious hybrid of individual and communal property. Each right-holder undoubtedly holds a private property right, even though in the case of a right appurtenant to the ownership of benefitted land, the right cannot be traded separately from the land it benefits. The right is however, *exercisable* in common with other private individuals who hold like rights over the same land or other resource. So, viewed from the perspective of the resource over which these rights are exercisable, the right-holders form a community who share the resource between themselves. The community of appurtenant land owners is, however, very different in nature from the community formed of people who have nothing in common other than their success in participating in a market for the allocation of the resource use right. Both types of community have a collective interest in the sustainability of their shared resource, but the appurtenant landowning community has a stable geographic and probably also social nexus which is more likely to be conducive to self-generation of a workable regulatory framework for the exercise of their collective rights.²⁶

Whatever the eligibility criteria, the essential characteristic of limited access communal property is, that the group itself does not have a separate legal identity, nor is there a single ‘representative’ owner who holds the rights on behalf of the others. The right-holder *is* the community, consisting of the present and future members of the group. It follows from this that the community is a fluctuating body of individuals. In the absence of any self-generated governance structure, no-one has the right to speak (or act) for the community as a whole. Even where there are self-generated norms about decision making within the community, there may be uncertainty over the strength of their hold over future members.

Limited access communal property differs from what for these purposes may be called public property in the important respect that members of the limited access community have the right to exclude non-members from the collective resource. In the case of public property (for example, a public right of way exercisable over private land, or public rights of access over private land under the English Countryside and Rights of Way Act 2000 and the Marine and Coastal Access Act 2009) every member of the community still has a right, exercisable in common with other members, to use the resource and not be excluded from it, but no-one can lawfully be excluded from the resource because everyone in the world is a member of the community. Whilst public property is of great importance, it is much easier to integrate it within a civil law or a common law private property rights system,²⁷ and it will not be considered further here.

²⁶ For a valuable analysis of the difference between the two, see the opposing views of R. Walker LJ in the Court of Appeal decision in *Bettison v Langton* [2000] Ch 54 and Lord Nicholls in his dissenting judgment in the same case when it went on appeal to the House of Lords, *Bettison v Langton* [2001] UKHL 24 (the House, by a majority, upheld the view of R. Walker LJ). Lord Nicholls’ view (that severance of appurtenant rights so that they became freely tradable was undesirable) was vindicated when the effect of the majority decision of the House of Lords was subsequently reversed by Parliament with retrospective effect: see now sections 9-10 of the Commons Act 2006.

²⁷ If only because the interest of the community is closely aligned with the public interest.

2. COLLECTIVE PROPERTY DISTINGUISHED FROM CO-OWNERSHIP AND OTHER GROUP OWNERSHIP STRUCTURE IN GERMAN LAW

Collective property rights in the above sense are an especially tricky issue in Germany. After WW II, collective property forms were sceptically looked at for political reasons (split off of the socialist part of Germany). Only “Genossenschaften” saw a revival in the 1980s. Thus, there is little reflection about collective titles.

German law does however recognise co-ownership and other forms of group ownership structure. Co-ownership is different in kind from collective ownership. Here, several identified people hold one title. In German law, it is rudimentarily codified in § 1008 BGB. In essence, the paragraph builds on a two pillars dogmatic (either §§ 705 et seq. BGB “Gesellschaft”, or § 741 BGB “Gemeinschaft”) and adds some regulation to the second (§§ 741 et seq. BGB) system.

In practice, ‘group ownership’ can be structured in various ways which allocate enforceable rights to the constituent individual members without conferring property rights on them. As long as a “collective” (several people) is represented by one person (who is assigned in trust), and the relationship between the group and the resource can be translated into forms of individualistic assignment, on the surface, there is no problem. However, under the surface, there are problems of who is part of the collective and what can be done if the person in trust violates his/her duties.

Even though German law may not recognise collective property (in our sense) within its domestic law, it has no choice but to accommodate it, by some means or other, when it comes into contact with other legal regimes where such rights are recognised. In particular, problems occur when traditional (indetermined group) property rights conflict with formal rights recognised in the same resource. This may arise in an acute form in relation to land use rights of farmers, and traditional knowledge holders and patents.

Western countries are able to acknowledge the position of the collective through a conflict of laws approach under specific conditions.²⁸ One of them is that the Western country has signed international conventions acknowledging rights and those rights are granted in concrete terms in the country of origin.²⁹ The dogmatic point of departure could be the (individual) right to autonomy.

²⁸ C. Godt, Enforcement of Benefit Sharing Duties in User Countries Courts, in: E. Chege Kamau/G. Winter (eds), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit-Sharing*, London/Lifting: Earthscan, 2009, pp. 419-438.

²⁹ For example, under the UN Declaration on the Rights of Indigenous Peoples 2007.

3. COLLECTIVE PROPERTY DISTINGUISHED FROM CO-OWNERSHIP AND OTHER GROUP OWNERSHIP STRUCTURES IN ENGLISH LAW

The recognition of collective property rights is more complex in English law, although not a great deal more extensive. The basic principles are not dissimilar from those operating in German law. So, English law recognises co-ownership, i.e. where several identified people hold a single title, in the forms of ownership in common and joint ownership. The operation of co-ownership is dominated by trusts law, which vests title to the resource in a small number of trustees, requiring them to hold it for the benefit of the beneficial co-owners.³⁰ Since in English law governance by trustees follows the 'benevolent dictatorship' model (trustees are required by law to act in the best interests of the beneficiaries, not necessarily in accordance with their wishes), co-ownership is not always an appropriate vehicle for collective interests in resources.³¹

Also like German law, English law recognises group ownership in corporate form. English company law provides a range of corporate forms, some specifically intended for the regulation of common-interest communities, such as commonhold associations (regulating condominium management under the Commonhold and Leasehold Reform Act 2002), co-operatives and mutual benefit societies, now governed by the Co-operative and Community Benefit Societies and Credit Union Act 2010.³² These forms are, however, heavily influenced by the classic English limited liability trading company form,³³ which again is not always an appropriate vehicle for collective interests.³⁴

English law has no easy property solution for groups who have a collective interest and wish to make collective use of a resource, but who choose not to incorporate. Such groups, referred to by lawyers as unincorporated associations and by laypeople as clubs, are very numerous in practice: most non-commercial sports and recreational clubs take this form. They are perceived by all but lawyers as entities, but in law they are not entities and they have no legal status separate from that of

³⁰ Since 1925, a trust is automatically imposed whenever interests in land are co-owned (Law of Property Act 1925, sect. 34 and 36, as amended). The relationship between trustees and beneficiaries of interests in land is currently regulated by the Trusts of Land and Appointment of Trustees Act 1996. A trust is not required for co-ownership of anything other than land, but is frequently used in practice; see *R. Smith*, *Plural Ownership*, Oxford: Oxford University Press, 2005; *J. Hill/E. Bowes-Smith*, *Joint Ownership of Chattels*, in: N. Palmer/E. McKendrick (eds), *Interests in Goods*, London: Lloyds of London Press, 2nd ed., 1998, Chapter 10.

³¹ *A. Clarke*, *Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework*, in: J. Holder/C. O'Connell (eds), *59 Current Legal Problems 2006*, Oxford: Oxford University Press, 2005, pp. 319-357.

³² When brought into force, this will bring together disparate statutory regimes governing 'industrial and provident societies' (mainly mutual and/or not-for-profit societies), and other mutual, co-operative and community purpose organisations.

³³ Now regulated by the Companies Act 2006.

³⁴ *A. Clarke*, *supra* fn. 29.

their individual members.³⁵ They have names, but they cannot hold property rights in their own name. The resources which they regard as ‘belonging’ to them (their premises, their bank accounts etc.) have to be vested in an individual member of the association (perhaps the secretary or chair or treasurer) who is then bound, by a complex of contract and trust rules, to use them for the purposes of the association. These rules have been evolved by the courts over the last century and a half, and no-one pretends they are satisfactory.³⁶

However, unlike German law, English law does recognise some forms of collective property right, even if there are not very many of them. They are generally of feudal origin or derive from ancient or not-so-ancient custom. They exist today because the English property law system results largely from evolution rather than design. The feudal structure of English property law has been significantly changed by statute over the years³⁷ but it has never been formally abolished, unlike in Scotland,³⁸ and at no time since feudal times has there been a comprehensive review and systematisation of types of property right.³⁹ The range and structure of private ownership-type rights was re-modelled by the 1925 property legislation, but this left particular use rights⁴⁰ largely untouched, especially those that could be held collectively. In particular, the collective ones were not brought within the land registration system: under the Land Registration Act 1925 they were neither registrable nor discoverable from the Land Register, and the same is true under the 1925 Act’s successor, the Land Registration Act 2002.⁴¹ They fall within a residual class of property rights in land, overriding interests, which are enforceable against registered owners even though outside the registration system.⁴² In the middle of the twentieth century an attempt was made to have all the collective ones registered, but under newly created regional registers, operated by local

³⁵ Except for limited purposes such as taxation: *Conservative Central Office v Burrell* [1982] 1WLR 522.

³⁶ *Re Horley Town Football Club, Hunt v McLaren* [2006] EWHC 2386; *Hanchett-Stamford v Att Gen* [2008] EWHC 330; *A. Clarke/P. Kohler*, supra fn. 3, pp. 599–605.

³⁷ Most significantly by the Law of Property Act 1925 and the other 1925 property statutes.

³⁸ The feudal system was abolished in Scotland in 2004 by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (SSI 2003/456), sect. 2 of which converted a *dominium utile* of land into “the ownership of the land”. The Law Commission for England and Wales set out to do the same for English and Welsh law, launching a Feudal Land Law project in its 9th Programme of Law Reform (2005, Law Com 293, HC 353) to investigate the removal of the “several residual but significant” feudal elements of the law (paras 3.10–3.13). However, the project was deferred, first to the 2008 10th and then to the 2011 11th Programme, because of pressure on resources from other law reform projects. Finally in its 11th Programme the Commission reported that it was to be deferred yet again, this time apparently indefinitely, because “other proposed law reform projects offer the potential for greater public benefit than work on feudal land law”, 11th Programme of Law Reform, 2011 Law Com 330 H 1407 para 3.3.

³⁹ The current system of land registration, introduced by the Land Registration Act 1925, is primarily concerned with registration of land titles, not interests in land.

⁴⁰ I.e. in general terms, servitudes and usufructs.

⁴¹ The same fate was shared by the interesting and arcane surviving relics of the manorial system of land holding described in *C. Jessel, The Law of the Manor*, Chichester: Barry Rose Law Publishers Ltd, 1998, pp. 427–437, which are largely individual rights, still held by the lord of the manor, where one still exists.

⁴² See now Land Registration Act 2002, sched. 3 and sched. 1; *A. Clarke/P. Kohler*, supra fn. 3, pp. 554–566.

government, which had no connection with, and operated quite differently from, the national land registration system.⁴³ This was done by the Commons Registration Act 1965. The decision to create special dedicated registers for these rights is made all the more remarkable by the fact that these rights are, for the most part, exercisable over land in which private property rights also exist, and these private property rights over the same land *are* registrable in the national land register. This arises because the collective rights governed by the Commons Registration Act 1965 and now the Commons Act 2006 are not ownership-type rights. They are rights to use land and resources for particular purposes which are exercisable over land which is usually privately owned.⁴⁴ So, the ownership title is registrable in the national land register, where all other private property rights over the land will also appear⁴⁵, but reference must be made to the quite separate regional registers to discover these collective rights. This is of some significance because, as explained below, the existence of these collective rights severely curtails the owner's own use rights over the land.

Specifically, the Commons Registration Act 1965 provided for the registration of two different kinds of collective land right, and for the registration (in these special regional registers) of the land over which these rights were exercisable. The first category of rights consists of the rights of common referred to above (both appurtenant rights and rights in gross), i.e. the right of a private individual to take a specified natural resource from land owned by someone else, the right being exercisable in common with others having a like right. These rights are now registrable in the regional Commons Registers. The land over which rights of common are exercisable is then given a special status – 'common land' – and made registrable as such, again in the regional Commons Register. As already noted, this is in addition to, and separate from, registration of the ownership title to that land in the national Land Registry. As an added complication, once the land acquires the status of 'common land', it also becomes *prima facie* subject to the public rights of access for open-air recreation regime which was introduced for the whole of the country by the Countryside and Rights of Way Act 2000 and in some cases to public rights of way.⁴⁶ The second category of ancient collective right made registrable under the Commons Registration Act 1965 is a form of recreational right acquired by prescription by inhabitants of a locality or neighbourhood over land that is privately or publicly owned. Once the local inhabitants have been able

⁴³ As already noted, the national Land Registry is a registration of title system; these regional registers of collective rights are registers of land, not registers of titles to land.

⁴⁴ The land is sometimes owned by a local government authority, sometimes by private individuals.

⁴⁵ Apart from the private property rights which also come within the overriding interest category (now not an extensive class: see Land Registration Act 2002, sched. 3 and sched. 1).

⁴⁶ Public rights of access apply to all open land in Britain, although with severe limitations: for a detailed comparative account see *J. L. Anderson*, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 *Georgetown International Environmental Law Review* 2007, p. 375; for public rights of way over common land see Law of Property Act 1925, sect. 193 and sect. 194, now repealed and replaced by the Commons Act 2006, sect. 38–44.

to prove they have used that land as of right (meaning *nec vi, nec clam, nec precario*⁴⁷) for 'lawful sports and pastimes' for the requisite period (twenty years) they become entitled to have the land registered with another special status – as a 'town or a village green'. Registration is in the regional Registers of Town and Village Greens. Once the land is registered as a town or village green, the local inhabitants become entitled to use it for *any* 'lawful sports and pastimes', not just for the purposes for which they used the land over the past twenty years.⁴⁸

In some ways, these collective recreational rights are very different from the collective rights of common. No member of the collective has an individual private right over the land, still less a tradable right. The collective is defined by reference to habitation in a locality or neighbourhood, so membership is not only fluctuating but indeterminate. Further, there is no statutory or common law procedure for extinguishing these recreational rights once they have become established. This means that they are in practice perpetual, and since the membership of the collective rights holding group is indeterminate, there is no way in which the collective can bind itself to agree to extinguish, sell or surrender the rights. There are however two important respects in which the collective rights of common and the collective recreational rights do resemble each other. First, as already noted, the land over which the rights are exercisable – common land, and land which is a town or village green – never becomes collectively owned. It remains throughout owned by its pre-existing private owner. Secondly, it becomes a criminal offence for anyone to cause damage to the land or to undertake any act which interrupts the use and enjoyment of the land in exercise of the collective rights.⁴⁹ This imposes a further significant limitation on the exercise of the private landowner's rights.

For most of the twentieth century these collective rights were considered to be of little importance. The Commons Registration Act 1965 resulted from a Royal Commission⁵⁰ which had been set up to look into the means by which long established common land might be preserved, following decades of decline accelerated by severe disruption during the second world war, when many common lands were temporarily requisitioned for military purposes or dug up for food production. The Royal Commission was concerned with preserving the

⁴⁷ Meaning "not by force, nor stealth, nor the licence of the owner" (Lord Hoffmann in *R v Oxfordshire County Council Ex parte Summingwell Parish Council* [2000] 1 AC 335, pp. 350-351). This requirement causes the courts continuing difficulties: see also *R (Beresford) v Sunderland City Council* [2003] UKHL, *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 and *R. (on the application of Barkus) v North Yorkshire County Council and Scarborough Council* [2012] EWCA Civ 1373. The problems are discussed in *J. Farrand/A. Clarke supra* fn. 21 at para 1.132.

⁴⁸ Confirmed by the House of Lords in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25.

⁴⁹ Inclosure Act 1857, sect. 12; encroachment on a green also becomes a public nuisance: Commons Act 1876, sect. 29, and for common land see also *ADM Milling Ltd v Tewkesbury Town Council* [2011] EWHC 595.

⁵⁰ The Royal Commission on Common Land 1955-58 (1958), Cmnd 462 (the Jennings Report).

national heritage, for historical, cultural and environmental reasons.⁵¹ It did not pay serious attention to the possibility that anyone might want to create new collective rights in the future. Consequently it recommended that all surviving commons and town and village greens and all collective rights over them should be registered by a cut-off date in 1970, and that legislation should then clarify the nature of the rights and provide a regulatory system for the registered rights and control of the resources over which they were exercisable. What actually happened was that the Commons Registration Act 1965 achieved the first objective – registration of all pre-existing rights – but did not attempt the others. To make matters worse (or better) the 1965 Act stimulated a rejuvenation of these collective rights and also left it open for new rights to be created in the future, not just by deliberate grant in the case of rights of common, but also, in the case of the town and village green recreational rights, by twenty years' user as of right⁵² after the 1970 registration cut-off date. By the early 1990s (i.e. 20 years later) it became commonplace for projected developments of undeveloped or open derelict land to be met by applications made by local people for the registration of the development land as a town or village green, on the basis of twenty years of recreational use made of the land by local inhabitants since 1970.⁵³ There was nothing in the 1965 Act to allow for the up-dating of the registers to cover these new rights, still less anything to govern the post-registration relationships between these new collective users and the underlying private owners. The up-dating problem will be largely removed by the Commons Act 2006, which when fully implemented will eventually replace the 1965 Act and will also introduce some default provisions for the governance of common land, to be used when pre-existing self-regulation systems fail.⁵⁴ But none of this legislation has even begun to address the question of the co-existence of the collective and the private within these systems, and within the broader private rights context in which these collective rights are nested. This has been left to the courts to work out in the future on a case by case basis, with little guidance as to how these collective rights are supposed to operate within their private law framework. The modern experience of collective rights in domestic English law is, therefore, not propitious.⁵⁵

⁵¹ Many commons and town and village greens were – and are – classified as Sites of Special Scientific Interest and Areas of Outstanding Natural Beauty.

⁵² I. e. satisfying the requirement of user *nec vi, nec clam, nec precario* explained in footnote 47 above.

⁵³ The number of successful applications for registration is small but not insignificant. In 2008 an estimated 196 applications were made, and in the same year 73 applications were determined, of which 23 were successful (para 4.1.4 of Department for Environment Food and Rural Affairs, Consultation on the Registration of Town and Village Greens, July 2011, available from www.defra.gov.uk (accessed on 31 Oct. 2012). A DEFRA commissioned survey published by the Countryside and Community Research Institute in 2009 found that just under half of applications made between 2004 and 2009 were “directly linked in some way to planning applications or allocation of sites for development in the local authority’s local plan” (para 4.2.1 2011 DEFRA Consultation).

⁵⁴ For a detailed and illuminating account see *C. P. Rodgers/E. A. Straughton/A. J. L. Winchester/M. Pieraccini, Contested Common Land: Environmental Governance Past and Present*, London/Washington D.C.: Earthscan, 2011.

⁵⁵ Further legislation is proposed to increase the difficulty of registering land as town and village greens: 2011 DEFRA Consultation, setting out the proposals. This is seen as part of a broader

IV. RECOGNITION OF COLLECTIVE RIGHTS TO USE OR CONTROL NATURAL RESOURCES

The juxtaposition of collective and private property rights comes most pressingly into focus in the current debate about the type of property rights regime which might be most conducive to promoting inclusive economic growth and sustainable development of land and other natural resources such as water, fisheries and forestry.⁵⁶ It is no longer taken as an absolute, by economists and policy makers, that efficient use and exploitation of land and natural resources demands either centralised control or privatisation of the commons allowing market forces to operate to achieve maximum efficiency. The many and various problems arising out of centralised control have long been realised, not least because of the examples provided by communist regimes. However, privatisation was, until comparatively recently, established wisdom within bodies such as the World Bank and other development agencies, who sought to impose homogenous systems of private ownership of land and tradable private property rights in natural resources in developing countries as a means of stimulating economic growth.⁵⁷ These early development initiatives ignored or sought to eliminate altogether collective resource use rights. In this they were strongly influenced by two conceptual developments. The first was Garret Hardin's *Tragedy of the Commons* thesis,⁵⁸ more fully developed by Harold Demsetz,⁵⁹ that only private ownership and/or public control of land and natural resources could effectively avert the inevitable over-exploitation of and under-investment in natural resources that, they argued, must inevitably follow whenever collectively used resources became scarce. The second was Hernando de Soto's *The Mystery of Capital*,⁶⁰ arguing that creation of wealth in developing countries could be achieved by conferring formal property rights on *de facto* land users with no formal rights. The property rights he had in mind were rights approximating to civil law private ownership rights which, crucially, would

project to reform planning laws to facilitate development, politically highly contentious: for the opposing views see the respective websites of DEFRA, the relevant government department (www.defra.gov.uk) and organisations such as the National Trust (www.nationaltrust.org.uk) and the Open Spaces Society (www.oss.org.uk) (all accessed on 31 Oct. 2012).

⁵⁶ For only the more recent of the extensive range of studies see for example *R. Baines*, *Property Rights and Natural Resources*, Oxford: Hart Publishing, 2009; *A. Scott*, *The Evolution of Resource Property Rights*, Oxford: Oxford University Press, 2008; *L. Godden/M. Tehan* (eds), *Comparative Perspectives on Communal Lands and Individual Ownership*, Oxford: Routledge, 2010; *A. McHarg/B. Barton/A. Bradbrook/L. Godden* (eds), *Property and the Law in Energy and Natural Resources*, Oxford: Oxford University Press, 2010; *B. van Koppen/M. Giordano/J. Butterworth* (eds), *Community-based Water Law and Water Resource Management in Developing Countries*, Wellingford: CAB International, 2007.

⁵⁷ See the narrative in *R. Dyal-Chand*, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 *Rutgers Law Journal* 2007-2008, p. 59.

⁵⁸ *G. Hardin*, *The Tragedy of the Commons*, 162 *Science* 1968, pp. 1243-1248.

⁵⁹ *H. Demsetz*, *Towards a Theory of Property Rights*, 57 *American Economic Review* 1967, pp. 347-359.

⁶⁰ *H. de Soto*, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, New York: Basic Books, 2000; see also *H. de Soto*, *The Other Path*, New York: Basic Books, 1989.

give the right-holders tradable rights which would allow them to attract investment and participate in a market economy. De Soto's compelling argument led to, amongst other things, the initiation of land titling programmes in a number of developing countries, many of which failed to take into account the complex pattern of collective resource use which they sought to replace. The failure of many of these earlier initiatives⁶¹ coincided with, and to some extent stimulated, critiques of both analyses. As legal and economic theorists have pointed out, history simply does not support Hardin's assertion that the 'tragedy' is indeed tragic (in the sense of being an inevitable outcome) once one distinguishes between open access and limited access collective rights, a distinction Hardin failed to make.⁶² And meanwhile scholarship on legal pluralism and path dependence has cast doubt on whether it is ever actually feasible to transform the informal property rights of the poor into tradeable private property rights, still less whether it would decrease poverty overall and whether the results would be culturally and politically acceptable to the people involved.⁶³ Attention has moved to what has been described as a polycentric approach to resource management and development, in which collective resource use has a key position. The principal apologist for this modern approach, Elinor Ostrom, argues that development of natural resources which is both sustainable and achieves a socially acceptable maximisation and distribution of wealth, needs to incorporate localised collective use and control of the resource, building on the idiosyncratic pattern of self-regulation historically evolved by the local collective users themselves in response to their particular conditions.⁶⁴ This is particularly but not uniquely relevant for developing countries

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- ⁶¹ Chronicled by, amongst others, *R. Dyal-Chand*, A Poor Relation? Reflections on a Panel Discussion Comparing Property Rights to Other Rights Enumerated in the Bill of Rights, 16 William & Mary Bill of Rights Journal 2008, p. 849; *ibid*, Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights, 39 Rutgers Law Journal 2007, p. 59; *M. Trebilcock/P.-E. Veel*, Property Rights and Development: The Contingent Case for Formalisation, 30 University of Pennsylvania Journal of International Law 2008-2009, p. 397.
- ⁶² *A. R. Poteete/M. A. Janssen/E. Ostrom*, Working Together: Collective Action, the Commons and Multiple Methods in Practice, Princeton: Princeton University Press, 2010, Chapter 2; for the survival of successful commons in strikingly diverse social and economic contexts: see *G. Stevenson*, Common Property Economics: A General Theory and Land Use Application, Cambridge: Cambridge University Press, 1991 (Swiss grazing pastures); *M. Heller*, "Why Aren't Oysters Extinct"?, in: *M. Heller*, Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives, New York: Basic Books, 2008, pp. 166 et seq.; see also *A. Sinden*, The Tragedy of the Commons and the Myth of a Private Property Solution, 78 University of Colorado Law Review 2007, pp. 533-612.
- ⁶³ *M. Trebilcock/P. E. Veel/P. Ho/M. Spoor*, Whose land? The political economy of land titling in transitional economies, 23 Land Use Policy 2006, p. 580; *R. Dyal-Chand*, supra note 61; *D. Benjamin Barros* (ed.), Hemando de Soto and Property in a Market Economy, Ashgate: Farnham, 2010; see also *F. K. Upham*, From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory, 41 New York University Journal of International Law and Politics 2008-2009, p. 551, pointing out that, in the case of China at least, transformation of use rights/informal rights into secure private property rights was manifestly not necessary in order for China to achieve economic growth.
- ⁶⁴ *E. Ostrom*, Governing the Commons: the Evolution of Institutions for Collective Action, Cambridge: Cambridge University Press, 1990; see also *E. Ostrom*, Coping with Tragedies of the Commons, 2 Annual Review of Political Science 1998, p. 493; *A. R. Poteete et al* 2010

which have complex land tenure systems derived from diverse legal orders (some of statutory origin, others customary, often with regional variations), not all of which are fully integrated or even fully recognised within the legal system of the country as a whole, and where a significant number of people, many of them women and/or from disadvantaged groups within their society, are economically dependent on land but have no formal rights in it. Current analysis of the relationship between land tenure and development confirms that in regions where these conditions apply, inclusive economic growth and environmental sustainability are most likely to be achieved through a recognition and legitimation of this complex of formal and informal land rights and land usages in which collective use is likely to figure prominently,⁶⁵ and on the adoption of an inclusive bottom up rather than top down approach to resource management, on the lines of the Ostrom polycentric approach.

The legal challenge that then arises is how to accommodate these collective rights within a legal system which might also want to locate ownership of the resource, or of the land on which it is situated, or of the means of production, regulation or exploitation,⁶⁶ in a private individual or in the state. There are formidable difficulties in devising institutions which will allow collective resource users to negotiate and co-operate in sharing the resources on fair terms with private owners, public interest bodies and state bodies. Who is to be entitled to speak on behalf of the collective and make decisions binding on it? What weight is to be given to their local interest as against, for example, the national interest? How to avoid the stultifying effect of an anticommons,⁶⁷ where effective use of resources is snagged by the need to obtain the consent of too diverse a body of right-holders? How can an unwieldy body like a non-corporate collective group participate on equal terms in an allocation system that depends, for example, on applying or bidding for a use licence, or operating in a market where use rights are traded?

V. RECOGNITION OF INDIGENOUS AND MINORITY LAND RIGHTS

The difficulties outlined in the previous section are exacerbated where there are ethnic and/or cultural differences between the collective users and the private owners. This is a particular problem for countries with a comparatively recent history of colonisation by civil law or common law states. In these countries the

(supra note 62) and *C. P. Rodgers et al*, *Contested Common Land*, London/Washington: Earthscan, 2011, pp. 11–16.

⁶⁵ *UN-Habitat*, *Secure Land Rights for All*, 2008; *C. Toulmin and J. Quan* eds, *Evolving Land Rights, Policy and Tenure*, DFID/IIED/NRI, 2000; *R. Meinzen-Dick and E. Mwangi* *Cutting the Web of Interests: Pitfalls of Formalizing Property Rights*, 26 *Land Use Policy* 2008, p. 36; *K. Deininger*, *Innovation in Land Rights Recognition, Administration and Governance*, World Bank, 2010.

⁶⁶ For example, through establishing markets in emission rights or water extraction rights to cap levels of emission or consumption.

⁶⁷ *M. Heller*, *Gridlock* (supra note 62), pp. 33–41; see also *M. Heller*, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 *Harvard Law Review* 1998, p. 621.

coloniser's law typically was superimposed on an indigenous legal culture that was predominantly communal and practiced by a population that was culturally and ethnically alien to the colonisers. The indigenous resource use rights were traditionally not recognised by the colonising state, except (if at all) in so far as they resembled the private property rights recognised under the coloniser's legal system.⁶⁸ In former common law colonies collective indigenous rights were the worst casualties. The first stage in the modern recognition and protection of these indigenous rights was the recognition of the validity of the claims – essentially, that indigenous peoples had to be recognised as having property rights in natural resources, defined by reference to their traditional customary use of them.⁶⁹ But in most countries by the time this had been recognised, private common law rights had already long been established over the very same resources, and there was also a growing awareness of a strong public interest in the sustainable development of those resources.⁷⁰ How, now, are these competing interests to be reconciled?

It is not surprising that a civil law coloniser bringing with it the concept of unitary ownership should have found the collective nature of indigenous cultures so alien. It is more surprising that the same seems to have been true of common law colonisers. At the time of common law colonisation – the 18th and 19th centuries – communal or collective property was still a significant force in English common law as it then applied in England. However, it does not seem to have figured in the model of the common law that was exported to the colonies.⁷¹ The common law model the colonisers took with them was one of private property rights issuing out of Crown ownership. If they had looked more closely – or more objectively – at the way the indigenous populations made use of natural resources the colonisers would not have found it so very difficult to find equivalents in contemporary English collective property rights. But the common law colonisers did not seem to make that connection, whether out of ignorance of English law, or because of an inability to see past the racial and cultural differences between themselves and the indigenous peoples, or simply a disinclination to recognise the indigenous populations as having any rights enforceable against them. For whatever reason, in those countries collective resource use was and remains associated with dispossessed

⁶⁸ This was the approach taken by Justice R. Blackburn in the Australian case *Milimpum v Nabalco Property Ltd* (1971) 17 FLR 141, supra footnote 6: it was formally abandoned by the Australian courts in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

⁶⁹ In Australia this was achieved by the High Court of Australia in *Mabo v Queensland (No. 2)*, supra fn 68 and the Native Title Act 1993; for international law recognition of the same principle see now UN Declaration on Recognition of Indigenous and Minority Peoples Rights 2007.

⁷⁰ On the inter-relation between indigenous rights and ecological management see for example *H. Leake*, ed, *Bridging the Gap: Policies and Practices on Indigenous Peoples' Natural Resource Management in Asia*, United Nations Development Programme, 2008.

⁷¹ Although, see *G. S. Alexander*, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776–1970*, Chicago/London: Chicago University Press, 1997; *R. C. Ellickson*, *Property in Land*, 102 *Yale Law Journal* 1993, p. 1315, and *S. Banner*, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska*, Cambridge: Harvard University Press, 2007, for examples of early American settlements organised on communal lines, and their gradual conversion into private property communities.

and oppressed indigenous or minority populations, separated from the private property owning majority by ethnic and cultural differences. Once there is this cultural and ethnic divide between the collective users and the individualistic private property user, it is no longer a question merely of integrating the communal and the private property rights within a single property rights framework. The challenge becomes one of recognising and operating plural normative systems, allowing what are essentially different legal systems to operate in parallel, in which the communal and the private property rights of different cultural and/or ethnic groups co-exist on equal terms, each within its own distinctive culture, but all exercisable over, and competing for access to, the same resources.⁷²

VI. CHINESE PROPERTY RIGHTS: PRIVATE PROPERTY RIGHTS WITHIN A SYSTEM OF COLLECTIVE AND STATE OWNERSHIP

Other states – notably Japan, China, and some former communist states – have more recently adopted property systems based on the civil law model, more or less voluntarily. But this has not always extended to a full acceptance of individualised property rights. For present purposes, the most interesting example is China. The People's Republic of China adopted a civil code modelled on the German system in 1949. However, there was no comprehensive Code covering property law until the passing of the Property Rights Law in 2007. This legislation, also consciously modelled on German law, was controversial within China and had a long gestation period, during which German academic lawyers acted as consultants in the legislative process.⁷³ It seems that, despite pre-existing historical ties with the German civil law system, adopting the German model for the new Property Rights Law was by no means a foregone conclusion. It has been said that in formulating the 2007 law, China saw itself as having a choice between adoption of a US-style common law system, which would have facilitated alignment with the common law influenced Hong Kong and Singapore systems, or a German-style civil law system, aligning itself with Japan and Taiwan.⁷⁴ In any event, for many westerners (civil law

⁷² T. G. *Svensson*, Interlegality, a Process for Strengthening Indigenous Peoples' Autonomy: The Case of the Sámi in Norway, 51 *Journal of Legal Pluralism and Unofficial Law* 2005, pp. 51-52, contrasting legal pluralism with 'interlegality'. As *S. van Eep*, Comparative Property Law, in: M. Reimann/R. Zimmermann (eds), *Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 2006, p. 1044 points out, the way in which indigenous land claims can be fitted into Western systems of property law in post-colonial states is in essence a question of comparative property law; see also *M. Davies*, *supra* fn. 1, pp. 34-35.

⁷³ Prof. Dr. Gebhard M. Rehm, Professor of Civil Law, Comparative Law and Private International Law, University of Hamburg, and Prof. Dr. Hinrich Julius, Professor at the University of Applied Sciences, Hamburg and head of the legal cooperation office of the (then) Deutsche Gesellschaft für technische Zusammenarbeit (now: Gesellschaft für Internationale Zusammenarbeit), working on behalf of the German Ministry of Economic Cooperation and Development, the authors of 'The New Chinese Property Rights Law: An Evaluation from a Continental Perspective', 22 *Columbia Journal of Asian Law* 2009, p. 177.

⁷⁴ Y.-C. *Chang*, Property Law with Chinese Characteristics: An Economic and Comparative Analysis, 2011, available at SSRN: <http://ssrn.com/paper=1945147> (accessed on 31. Oct. 2012); he suggests that civil law won because of the obvious difficulties of transplanting the bottom-up common law type system, but also because civil law systems were seen to lend

and common law) the most striking feature of the 2007 Law is that it is stated to give “equal protection” to private property – that is, protection that is equal to that given to public and collective property. However, this protection does not manifest itself as an explicit recognition of private ownership for land users. Instead, in some categories of land use individuals are being given increasingly secure rights of use, control and regulation, not necessarily all concentrated in the hands of the same individual.⁷⁵ In this respect it is beginning to look more and more like a common law fragmentation of ownership system pragmatically developing within a civil law framework. However, notwithstanding the enhanced role of private property, the feature that distances the developing Chinese system from both its civil law roots and its common law characteristics, is the persistent significance of the collective. Collectives of varying forms have significant roles, sometimes as residual owners,⁷⁶ sometimes as holders of control and re-distribution rights,⁷⁷ sometimes as holders of use rights or rights to profits etc.⁷⁸ Should we be seeing this as a relic of communism, which will decline in importance as China abandons socialism in favour of a market economy (as many Chinese commentators fear⁷⁹), or is collectivism an inherent part of a system under which individuals are willing to accept curtailments of their individual preferences in the interests of the community

themselves more successfully to China’s highly centralised power structure (*ibid* at text surrounding footnote 5).

⁷⁵ *Ibid*, text surrounding footnotes 82–83.

⁷⁶ Broadly, rural land is divided into administrative and natural villages, and each village operates as the collective owner of the land within its administrative boundaries. The “collective economic organisation of the village or the villagers’ committee” exercises the “right of ownership” on behalf of the collective: Art 60 of the 2007 Property Act. For further details see *P. Ho*, *Institutions in Transition: Land Ownership, Property Rights and Social Conflict in China*, Oxford, Oxford University Press, 2005 and *S. Qiao* *Governing the Post-Socialist Transitional Commons: a Case from Rural China*, Paper 122 Yale Law School Student Scholarship Papers, 2012, available at http://digitalcommons.law.yale.edu/student_papers/122 (accessed on 14 Feb. 2013).

⁷⁷ E.g. Art 59 of the 2007 Law; also, until comparatively recently the collective was entitled to re-distribute use rights in farming land, broadly on social welfare grounds. Although this was formally prohibited by legislation in the 1990s it is reportedly still widespread in practice and also widely tolerated as a social welfare measure: *M. Trebilcock/P.-E. Veel*, *supra* fn. 61, pp. 429–430.

⁷⁸ Notable here is the Household Responsibility System (HRS), introduced in the 1980s and reportedly highly successful in improving agricultural productivity. It involves the partition of some collectively owned land and its allocation to individual households for a fixed term, the household being responsible for management and entitled to keep any surplus produce after meeting quotas: see the account in *M. Trebilcock/P.-E. Veel* *supra* fn. 61, p. 48 and in *Q. Long*, *Reinterpreting Chinese Property Law*, 19 *Southern Californian Interdisciplinary Law Journal* 2009–2010, pp. 55 et seq. The duration and security of farmers’ rights under the HRS Farmers was confirmed and strengthened by the Property Law 2007, but the holder of the farmer’s right remains the household, not the individual.

⁷⁹ See the widely reported and publicised letter of 12 Aug. 2005 to the Chairman of the National People’s Congress from Professor Gong Xiantian of Beijing University, protesting that the principles embodied in the then draft Law diverged from the fundamental viewpoints and principles of Marxism and of the socialism of the Chinese Communist Party: *G. M. Rehm/H. Julius*, *supra* fn. 73, p. 183. For an example of westerners voicing the same, but as a hope rather than a fear, see ‘China’s Next Revolution: Property Rights in China’, *The Economist*, 10 March 2007.

and in the interests of the protection of their local environment, relying on trust rather than on individual legal entitlement?⁸⁰ And if China is evolving a model for the way in which private property rights can be nested within a collective system, does this have lessons for common law and civil law systems which are trying to develop a model in which collective and private property rights can co-exist?

VII. CONCLUSION

Recent English experience of rejuvenated collective recreational rights illustrates the dangers of underestimating the difficulties arising when a modern common law system tries to accommodate collective rights, even where there is no cultural difference between the collective right-holders and the private right-holders, and so legal pluralism is not an issue. Within this limited context the English courts are beginning to develop concepts of co-operative use which might be useful in resolving the difficulties, but progress is slow, much remains unresolved and the issues will never be more than small scale.

The real challenge for civil law and for common law systems arises where collaboration between collective right-holders and private right-holders becomes a matter of necessity, either to promote sustainable development of scarce natural resources and inclusive economic growth, or in order to give proper cultural recognition to the collective right-holders. It is to these areas that comparative property lawyers must turn.

⁸⁰ See *F. K. Upham*, From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory, 41 *New York University Journal of International Law and Politics* 2008-2009, p. 551; *M. Trebilcock/P.-E. Veel* supra fn. 61, pp. 434-435; on collective rights generally in Chinese property law, see *P. Ho*, *Institutions in Transition: Land Ownership, Property Rights and Social Conflict in China*, supra fn. 76; *P. Ho* (ed.), *Development Dilemmas: Land Reform and Institutional Change in China*, London/New York: Routledge, 2005.

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Contents

Introduction <i>Christine Godt</i>	1
What is to be gained from comparative research and teaching? Thoughts for an ideal agenda <i>Franz Werro</i>	7
Commentary to Franz Werro <i>Gert Brüggemeier</i>	23
Strengthening the comparative method in European legal research: three suggestions <i>Aurelia Colombi Ciacchi</i>	25
The European Union development of European property law <i>Bram Akkermans</i>	39
Comparative property law: collective rights within common law and civil law systems <i>Alison Clarke and Christine Godt</i>	61
The Dutch and German notarial systems compared <i>Christoph U. Schmid</i>	83
La protection constitutionnelle des droits fondamentaux en France et en Allemagne: la montée en puissance des juridictions constitutionnelles <i>Götz Frank & Gilles Lebreton</i>	99
Eine alternative Förderalismusreform – das <i>Konsens-Reichsgesetz</i> als Muster für die Bundesrepublik? <i>Gerhard Hoogers</i>	109
L'emprise de la Convention Européenne des droits de l'homme sur la jurisprudence et la législation françaises dans le domaine de la liberté d'expression <i>Diane de Bellescize</i>	133

Governance and public health <i>Friedhelm Hase</i>	149
The quest for soft law as binding law contributing to European Integration <i>Herman E. Bröring</i>	155
The evolving conservation standards of EU marine environmental law and their effects on the common fisheries policy <i>Till Markus</i>	171
Who owns the North Pole? Concurrent claims of the arctic shelf and the challenges for international law <i>Thomas Heinicke</i>	187
Coastal protection planning in the Wadden area the role of facilitating legal systems <i>Ulrich Meyerholt and Wabbe de Vries</i>	205
<i>Addendum</i> Program 27-28 May 2010	212