

Article

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The functional comparative method in European Property Law

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I. Introduction

This paper contributes an appraisal of the recurrent functionalism debate from a property lawyer's perspective. It first explores the evolution of the functionalism discourse in general, and assesses critically its contemporary relevance (II.). It then analyses its influence on comparative property studies (III.). Since it reveals a quite antagonistic relationship with strong negative effects on comparative property law, the article continues with a reflection about a novel tailoring of comparative property analysis as a legal discipline (IV.). At the end, some conclusions will be drawn (V.).

II. Functionalism – the current debate re-visited

The current debate about functionalism appears anemic. It has lost its one-dimensional explicatory pretention after Michaels demonstrated that functionalism as such is not prone to harmonization.¹ As we will see, the contrary is true. It is also of decreasing relevance to contemporary problems because it lacks the historic dimension, which puts issues into perspective.² Therefore, I support Jaakko Husa's

¹ R. Michaelis, 'The Functionalist Method of Comparative Law' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook on Comparative Law* (OUP 2006) 340.

² Although even P. Legrand noted: "The view of comparative legal studies I defend focuses on the decisive historical interest of the comparer and the compared", P. Legrand, 'The Same and the Different', in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 311.

qualification of functionalism as a “rule of thumb”.³ This proposition is essentially shared by Smits⁴ and Graziadei.⁵ The center-piece of Husa’s analysis is that he traces “functionalism” back to Ernst Rabel and Max Rheinstein, who preceded Zweigert and Kötz. Rightly he points out that Ernst Rabel and Max Rheinstein were both interested in cautioning against the “norm-obsessed layer”.⁶ We have to add the word “national” [the “national” norm-obsessed lawyer]. Thus, functionalism has two distinctive historic roots, nationalism and positivism.

Nationalism in the first half of the 20th century (preceding and surviving the NS-rule⁷) had a strong influence on the education of the legal profession in Europe. Zweigert and Kötz have to be given credit for establishing comparative studies as a legal discipline by communicating its “usefulness” by simplifying functionalism to a *praesumptio similitudinis*.⁸ This is how they generated an interest amongst lawyers trained in the deductive analysis of national law for comparative legal studies. For all, from Rabel to Kötz, the essence of comparative law was its potential for safeguarding peace between nations as a means of understanding. In a political atmosphere where national differences are cherished, the intellectual focus on similarities has a critical potential. The methodological downside of the “likeness” approach is the focus on “comparability” which is driven by academic accuracy striving to avoid comparisons between “apples and pears” – an accuracy which played out to the detriment of comparative studies in property law (this point is elaborated under IV.). In contrast, where the political atmosphere cherishes similarities, the focus on differences deploys a potential for critique. Therefore, it is not the analysis of functions *a priori* which is

3 J. Husa, *Metamorphosis of Functionalism – or Back to Basics?* (2011) *Maastricht Journal* 548–553.

4 J. M. Smits, *Taking Functionalism Seriously: On the Bright Future of a Contested Method* (2011) *Maastricht Journal* 554–558.

5 M. Graziadei, ‘The Functionalist Heritage’ in P. Legrand and R. Mundag (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 100.

6 Husa (n 3) 551; supported by C. Joerges and D.M. Trubek (eds), *Critical Legal Thought* (Nomos 1989) 1

7 Which forced both, Ernst Rabel and Max Rheinstein, out of the country: Rabel, a catholic Austrian with Jewish ancestors, lost his chair in 1935 and his position as director of the Berlin Kaiser-Wilhelm-Institute in 1937. He emigrated in 1939 [A.-M. Gräfin von Lösch, *Der Nackte Geist: Die Juristische Fakultät der Berliner Universität im Umbruch von 1933* (Mohr Siebeck 1999) 368 f]. Rheinstein was his assistant 1922–33. Rheinstein emigrated to the US in 1933, first to New York working at Columbia Law School. Later he got a chair at Chicago University Law School. Ernst Rabel worked at the University of Michigan Ann Arbor and at Harvard Law School, Cambridge/Mass. R.-U. Kunze, *Ernst Rabel und das Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht 1926–1945* (Wallstein 2004).

8 Smits (n 4) 554.

affirmative e.g. to contemporary harmonization. As such, the method can equally be used to analyze differences.

The second dimension is positivism. While it was prevailing in Europe for the first half of the 20th century, Rheinstein was, at an early stage, exposed to its counter-concept of US-legal realism in 1933 while he was an assistant to Karl Llewellyn at Columbia Law School.⁹ Jurists who were exposed to scholars like Rheinstein, and later Schlesinger and Sacco¹⁰ did not shy away from critically reflecting the factual basis of cases and the social embeddedness of legal principles. However, comparative law remained a side discipline. This is because its strongest intellectual traditions are not “rooted” in, but are opposed to the prevailing mainstream.

What accounts for the current resurgence of the functionalism debate? It seems that the modern importance of comparative studies has become driven by the phenomenon labeled as “globalization”. Critical minds reflect on inherent [“functionalist”] theoretic path dependencies (P. Legrand: the inclination of modern positivistic comparative law towards harmonization¹¹). However, the reasons for a resurgence of the discourse might be more profound since the central question has changed: Today, the dominant question is no longer “why do we compare?” but “how do we compare?”. The question has shifted from the compared object (“What do we compare?”) to the comparing subject: How do we assure analytic quality when we compare our own laws to jurisdictions we are not trained and socialized in? How much “embeddedness” of the institutions in the other jurisdiction will we miss? What are our own silent assumptions that predetermine the outcome of the analyses? These questions have three different dimensions today. They touch on methods of teaching and research,¹²

⁹ On the (limited) influence of US legal realism on European jurisprudence G. Brüggemeier, *Prinzipien des Haftungsrechts* (Nomos 1999) 29; english translation: G. Brüggemeier, *Common Principles of Tort Law* (BIIC 2004) 29; also U. Drobnig and M. Rehbinder (eds), *Rechtsrealismus, multikulturelle Gesellschaft und Handelsrecht: Karl N. Llewellyn und seine Bedeutung heute* (Duncker & Humblot 1994).

¹⁰ Schlesinger, the director of the Cornell Project in the 60s, and Sacco, who developed the called „factual methodology“ (R. Sacco, ‘Legal Formants: A Dynamic approach to comparative law’ (1991) 39 *Am. J Comp L* 4) are spiritus rector a several projects of the contemporary Common Core Project on European Private Law, founded in Trento, now based in Torino <<http://www.common-core.org/> accessed 02 October 2012>.

¹¹ P. Legrand (n 2).

¹² C. Godt/G. Frank/G. Hoogers/S. V. Erp, ‘Team Teaching – The Hanse Law School Teaching Methodology’ (2011) 7 *Hanse Law Review* (issue 1, Special Issue) 67; C. Godt, ‘Comment on A. W. Heringa’ [*European Legal Education or Legal Education in Europe* (MJ) 2011] 221–224, (2011) 18 *Maastricht Journal on European and Comparative Law* 429.

they question methodological presumptions,¹³ and once again put the objects of established comparative studies into question. Only the latter is the focus of this article: While studies in comparative contracts and torts are by now well established (due to the *praesumptio similitudinis*), other areas like comparative property law¹⁴ and comparative administrative law¹⁵ have long been avoided.

III. Comparative Property Analysis – The Status Quo

The *praesumptio similitudinis* has had an inverse effect in comparative property studies compared to mainstream comparative studies. While the understanding of similarities grew in contract and tort, the evident differences between common and civil property laws became emphasized. For a long time, comparative property studies were close to non-existent.¹⁶ The seminal Zweigert/Kötz-Book did not include a section on property.¹⁷ The first good comparative contributions emerged only in the 1990s from conflict of law research about lost security rights on goods in transit due to a strict application of national laws following the *lex rei sitae*-rule.¹⁸ Sjeff van Erp pioneered the first teaching course on “Comparative Property

13 Michaelis (n 1).

14 S. van Erp and B. Akkermans, Property Law (Hart Publ. 2012); Prior: J.H.M. van Erp, ‘Comparative property law’ in M. Reimann and R. Zimmermann (eds), The Oxford Handbook of Comparative Law (OUP 2006) 1043.

15 S. Rose-Ackerman and P.L. Lindseth, Comparative Administrative Law (Elgar 2010); J. Bell, ‘Comparative Administrative Law’ in M. Reimann and R. Zimmermann (eds), The Oxford Handbook of Comparative Law (OUP 2006) 1259; H.E. Bröring, The quest for soft law as binding law contributing to European integration, in C. Godt (ed), Cross Border Research and Transnational Teaching under the Treaty of Lisbon (Wolf Publ. 2013) 155.

16 For a recent call of caution to functional comparisons see W. Faber, ‘Scepticism about the Functional Approach from a Unitary Perspective’ in W. Faber and B. Lurger (eds), Rules for the Transfer of Movables – A Candidate for European Harmonization or National Reform? (Sellier 2008) 97.

17 K. Zweigert and H. Kötz, Introduction to Comparative Law (3rd edn, Clarendon Press 1998; 1st. edn 1977).

18 E.-M. Kieninger, Mobiliarsicherheiten im Europäischen Binnenmarkt : zum Einfluß der Warenverkehrsfreiheit auf das nationale und internationale Sachenrecht der Mitgliedstaaten (Nomos 1996); E.-M. Kieninger (ed), Security Rights in Movable Property in European Private Law (CUP 2004); A. Swienty, Der Statutenwechsel im deutschen und englischen internationalen Sachenrecht unter besonderer Betrachtung der Kreditsicherungsrechte (Lang 2011).

Law” in 1998 at the University of Maastricht.¹⁹ Literature on comparative property law only began to be published at the beginning of the 21st century.²⁰ The first book on comparative property law came out 2012.^{20a} However, European comparative property studies have remained largely confined to transfer of movables, and security rights.²¹

As in any other field of law,²² comparative property analysis has become influenced by the current societal changes of (1) Europeanization,²³ Globalization, Internationalization, (2) technological change (digitalization, biomedical progress), and (3) societal changes arising from urbanization, de-colonialization, and an economization of politics.

(1) Europeanization, Globalization, Internationalization

European directives make a comparative interpretation of both the directives and of national law cogent²⁴ (multilevel analysis²⁵). Thus, the long lasting resistance towards what Zweigert coined the “fifth method” of interpretation²⁶ (the compara-

19 “Not an existing field of law in 1997”, J.H.M. van Erp, ‘European property law: A methodology for the future’ in R. Schulze and H. Schulte-Nölke (eds), *European Private Law – Current Status and Perspectives* (Sellier/European Law Publishers 2011) 227; prior, even in the comparative law programme at McGill Law School, property law for the common law system and the civil law system were taught separately, S. van Erp, ‘Teaching law in Europe: From an Intra-systemic, via a Trans-systemic to a Supra-systemic approach’ in A.W. Heringa and B. Akkermans (eds), *Educating European Lawyers* (Intersentia 2011) 79.

20 U. Mattei, *Basic principles of property law: a comparative legal and economic introduction* (Greenwood Press 2000); L.P.W. Van Vliet, *Transfer of movables in German, French, English and Dutch law* (Ars Aequi Libri 2000).

20a S. van Erp and B. Akkermans, *Property Law* (Hart 2012).

21 B. Lurger and W. Faber, *Acquisition and loss of ownership of goods* (Sellier 2011).

22 H. Muir Watts, ‘Globalization and Comparative Law’ in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 579.

23 Already identified by van Erp (n 14) 1048.

24 See S. van Erp and B. Akkermans, ‘European Union Law’ in Chr. Twigg-Flesner (ed), *Cambridge Companion to European Union Private Law* (CUP 2010) 173.

25 S. van Erp frames the requirement as follows: A lawyer may not ask “What does my national law say?” followed by the question: “To what degree does European law influence my system?” Instead, the question should be framed radically different and in a reversed order: “What does European law say and how does my national legal system fit into this European structure?” Editorial “From Comparative to European Law: A Changing Mindset?”, *EJCL* (Dec. 2011) <<http://www.ejcl.org/151/editor151.html>> accessed 2 October 2012.

26 K. Zweigert, ‘Rechtsvergleichung als universale Interpretationsmethode’ (1949–1950) *RabelsZ* 15 5ff.; diese Idee aufgreifend: J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des*

tive method beside the semantic, grammatical, systematic, and teleological) will not hold.²⁷ Bram Akkermans recently showed how European directives undermine the *lex rei sitae*-rule forcing the national judge to apply foreign property law (and its alien institutions).²⁸ Whereas Zweigert's goal was the opening for the application of foreign laws and rationales inside the nation state, we depend on a comparative approach in order to understand what the EU-legislator wanted to achieve. In this regard, the comparative (functional) method has to accomplish two things at the same time: identify comparative similarities, but equally highlight differences that the directive attended to either uphold or to overcome.²⁹

Globalization forces not only the national lawyer to apply foreign law at home, but internationally active lawyers to deal in his/her day-to-day life with a mosaic of different rules which originate in various jurisdictions, more so now even small and medium sized companies are active abroad. International legal counseling (Eastern Europe and Asia, esp. China) may sometimes provoke the illusion that law has been "exported", and is similar to domestic law.³⁰ However, literature of legal transplants has taught that institutions change once "transplanted" into a different legal environment.³¹ Things become even more fluid when countries model their laws on recent codifications of mixed jurisdictions, like the Dutch Civil Code of 1992. The Netherlands is historically influenced by France and Germany alike (incorporating different ideas), and in the last twenty years has also been strongly influenced by common law systems. In addition,

Privatrechts. Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre (4th edn Mohr 1990), (1st edn 1956) 346 ff.

27 F. Ranieri, 'Die Rechtsvergleichung und das deutsche Zivilrecht im 20. Jahrhundert: Eine wissenschaftshistorische Skizze' in F. Ebel and others (eds), Festschrift zum 70. Geburtstag von Knut Wolfgang Nörr (Böhlau 2002), as pdf-file available: <http://ranieri.jura.uni-saarland.de/Veroeffentlichungen/rvgl_u_dt_zivilr_i_20_jhd.pdf, 16> accessed 2 October 2012.

28 B. Akkermans, 'The European Union Development of European Property Law' in C. Godt (ed), Cross Border Research and Transnational Teaching under the Treaty Lisbon – Hanse Law School in Perspective (Wolf Publ. 2013) (forthcoming); for a thorough analysis of the tensions between *lex rei sitae* and EU policies B. Akkermans and E. Ramaekers, *Lex Rei Sitae in Perspective: National Developments of a Common Rule? Maastricht European Private Law Institute Working Paper No. 2012/14*, download: <http://www.maastrichtuniversity.nl/web/Institutes/MEPLI/Publications/WorkingPapersSeries.htm> (accessed 30 Jan. 2013).

29 Or as H. Muir Watts put it: caution against the "twin illusions" (similarity and ease) (n 22) 605.

30 S. van Erp, 'Comparative Private Law in Practise. The Process of Law Reform' in E. Örüncü and D. Nelken (eds), *Comparative Law* (Hart 2007) 399.

31 G. Teubner, 'Legal irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' [1998] 61 *Modern Law Review* 12; A. Clarke, *Integrating Private and Collective Land Rights: Lessons from China for sub-Saharan Africa?* *Journal of Comparative Law* (2013 forthcoming).

words like “property” mean different things in different legal systems. Thus, it is the task of the international lawyer to identify the meaning – a challenge that can only be mastered if he/she was exposed to comparative law during her studies.

Thirdly, international legal discourses of “property rights” are strongly influenced by modern economic theory³² and the common law understanding of “property rights” as assignments of rights to decide (bundle of sticks), and as rights which may well be subordinate to the “better right” of someone else (relational property). These concepts are alien to continental lawyers accustomed to unitary “ownership”. However, the strong impact of economic theory on policy making has introduced these terms into the international policy debates of almost all policy areas fields from fiscal policy to human body parts. In order to meaningfully participate in these discussions it is necessary to translate the meanings into domestic concepts. To continental lawyers, these debates are often even more uncomfortable since terms are often mixed up with ownership or individual and state sovereignty.

(2) Technological Change

Modern society is characterized by growing economic values enshrined in services (esp. digital services, financial services), biomedical progress, and intangible and intellectual values. The digital world brings about novel proprietary positions like virtual property. Medical progress brought a possibility to dispose of human body materials, body parts and tissues, and genetic information. All these assets range between personal rights and property rights which in conflict situations are seldom assigned according to wood-cut principles like the non-commercialization principle. Intellectual property or human rights of others emerge as limits to these rights forcing a balancing decision on the lawmaker and the judge – until recently quite unusual to property lawyers.

(3) Societal changes arising from urbanization, democratization and de-colonialization

Even more challenging to conventional property concepts are challenges arising from urbanization, democratization, decolonialization. In this regard, the pre-

³² Key concepts are the theory of internalization of external costs, institutional theory of behavioral incentives, distributional functions of property.

occupation with land law in academic property studies is not timely, considering that ordinary people acquire land only once in a life time, and social structures are not organized along feudal land property any more. In contrast, many people live in cities either without holding real property, or holding commonhold property.³³ A democratic, liberal perception of law is not consistent with a methodology that pretends that solutions are deduced from a coherent set of rules in a logical, mandatory way.³⁴ The modern rights perspective consists of entitlements which limit each other, and which need to be balanced.³⁵ In addition, various processes of de-colonialization challenge the conventional concept of property as a single title of an individual, like the collective interest of indigenous communities in a “native title” to land, traditional knowledge and genetic resources (*infra*).

All in all, these developments challenge the given structures of property law which evolved in the 18th and 19th century, and which proved quite functional under conditions of industrialization and early internationalization in the 20th century. These rest on clear-cut concepts of contract and property³⁶, as distinguished from company law and administrative law – assuming a clear-cut delineation between the private and the public.³⁷ However, while society internationalizes and changes, property analysis is equally asked to reflect emerging changes. The core of property analysis should center on the functions and concepts of property.

IV. Contours of Modern Property Law

What consequences follow for the structure, the content and the scope of modern property law? Academic scholars have to ascertain the basics of property func-

33 Therefore, multiple property as commonhold might become a prototype of modern property. For an attempt to structurally approach this topic comparatively see C. van der Merwe and P. Smith, ‘Commonhold – A Critical Appraisal’ in E. Cooke (ed), *Modern Studies of Property Law*, Vol. 3 (Hart 2005) 225; also van der Merwe’s Project on Commonhold under the umbrella of the Common Core of European Private Law (forthcoming).

34 Van Erp (n 14) 1048: „[property law is often taught [...] as a coherent set of mandatory and technical rules from which by an almost logical reasoning answers to individual problems can be deduced“.

35 J. Waldron, *The Right to Private Property* (Clarendon 1988); J. Habermas, *Faktizität und Geltung* (Suhrkamp 1992).

36 J.H.M. van Erp, ‘Servitudes: The borderline between contact and (virtual) property’ in S. van Erp and B. Akkermans (eds), *Towards a unified system of land burdens? (Ius Commune Europaeum, 59)* (Intersentia 2005, 1).

37 Muir Watt (n 22) 591.

tions, and the limits of entitlements (1). The heavy-duty work is re-conceptualizing the structural concepts (2). The societal changes demand the inclusion (and reflection) of the new rights that have emerged beyond immovable and movable property (3).

(1) Function

One might argue that the central property function today is commodification or the assignment of the power to decide. In theoretic terms, both are closely connected. The prize building mechanism rests on the principle that a potential seller has the power to decide with whom to contract, and under which conditions. The function of safeguarding freedom as stressed on the continent in the aftermath of the French revolution is today assigned to the principle of “private autonomy”, a conceptual shift that already signals that the freedom is limited by various means. Freedom is embedded in various arrangements, ranging from public law, multiple ownership, to the limitations by the rights of others, both by property rights and access rights. Therefore, the conceptual center of property is the power to decide. From a utilitarian perspective, property secures an efficient use of resources, including the potential to increase the use and value of property as security, and the transfer of use rights to others. Modern property law encompasses the traditional topics of creation, transfer and loss of rights. An important element of property is the effect on third parties (esp. as securities, as entitlements³⁸), and the limits to the assigned power (access rights).

A central contested issue to include into the future reflection of the “power to decide” is the traditional concept of the individual and exclusive power to decide.³⁹ It is the heritage of the French revolution, and the concept functioned as a fortress against public regulation in early 20th century. This base has given rise to an ambitious reflection about the “aboriginal [resp. native] title” and demands the recognition of “traditional knowledge”. However, there is a need to re-reflect the interdependency of private property and public goods. This

³⁸ Third party effect of software licenses in insolvency, for the recent shift in German adjudication (German Supreme Court [Bundesgerichtshof] 19 July 2012), O. Stöckl/A. Brandi-Dohrn, *Der dingliche Charakter von Lizenzen*, (2011) *Computerrecht* (CR), 553; F. A. Koch, *Kundenrechte bei Insolvenz des Softwareanbieters* (2012) *IT-Rechtsberater* (ITRB) 250.

³⁹ A. Clarke and C. Godt, ‘Comparative Property Law: Collective Rights within Common Law and Civil Law Systems’ in C. Godt (ed), *Cross Border Research and Transnational Teaching under Lisbon – Hanse Law School in Perspective* (Wolf Publ. 2012) (forthcoming).

theoretic debate is heralded in the recent commons debate, which enshrines both an ambitious reflection on collective action (co-management of resources, open source [Linux, Wikipedia], creative commons) and a reflection of access rights (public gardens, drinking water).⁴⁰ It is also needed with regard to the instrumental use of property rights by public regulation, e.g. emission rights. The conventional conception of property as natural entitlement is not functional here.

The same theoretic incommensurability exists with regard to the conception of use rights, which encompass constellations of multiple owners⁴¹ and access rights.⁴² While the English concepts of a bundle of sticks and the idea of overlapping, fragmented rights is more inclined to embrace innovations,⁴³ the continental concept of unitary property is not. Usually, courts rely on contracts, and, by doing so they merge elements and create arrangements which “balance the need to mitigate entropy in property by creating perpetual restrictions on the use and alienability of property [...] with the demands of landowners [...] to exercise their contractual freedom [...]”.⁴⁴ Maybe, the constitutional reflection on property rights⁴⁵ paves the way towards a better conception of these governance arrangements.

(2) Concepts

The grand theories of property are in need of a critical discourse. As much as the unitary/individual property concept is under pressure, so is the abstract delineation of property and contract drawn into question. This has become quite evident during the European exercise of formulating a harmonizing draft for securities in

40 E. Ostrom and C. Hess, ‘Private and Common Property Rights’ in B. Bouckaert (ed), *Property Law and Economics*, Encyclopaedia of Law and Economics, vol 5 (2nd edn Elgar 2010) 53; U. Mattei, ‘First Thoughts for a Phenomenology of the Commons’ in D. Bollier and S. Helfrich (eds), *Commons* (Levellers 2012) 37.

41 German Supreme Court (Bundesgerichtshof [BGH]) 22 March 2005 [X ZR 152/ 03], BGHZ 162, 342 (= GRUR 2005, 663) – Gummielastische Masse II.

42 F. Valguarnera, *Accesso alla natura tra ideologia e diritto* (Access to Nature between Ideology and Law) (Giappichelli 2010).

43 Nicely depicted already by F. Parisi, ‘The Fall and Rise of functional Property’ in D. Porrini and G. B. Ramello (eds), *Property Rights Dynamics* (Routledge 2007) 19, 26ff, esp. 30.

44 *ibid* 30.

45 S. van Erp, ‘EU Charter of Fundamental Human Rights and property rights’ in D. Wallis and S. Allanson (eds), *European property rights and wrongs* (Wallis 2011) 44.

movables,⁴⁶ and during the consultations prior to the submission of the European Commission's draft proposal of the Eurohypothec.⁴⁷

Similar frictions exist with regard to the objects that are to be protected as property, and with which effects. Are "claims" proprietary entitlements?⁴⁸ Is the right to light or the right to stay inside a shopping mall something that creates a "right against everybody"? In England, the "right to light" and the sibling "right to television signals",⁴⁹ the "right to stay in a shopping mall",⁵⁰ the air space above one's land,⁵¹ drilling rights for oil⁵² are contested issues of property law. So is the Commons Act of 2006,⁵³ which provides a mechanism for communities to secure village and town greens for recreational uses. Even maintenance duties deriving from matrimonial law are conceived as property issues (not contract or public law). Jurisdictions on the continent, esp. Germany, regulate property conflicts using either contract or public law – with the consequence that a tenant has only rights against the landlord, or the administration. In so doing, the tenants are deprived of some of their rights, and the owner is put in the center.

Similarly basic is the characteristic third party effect of property rights (effect *in rem*). What however, if the underlying agreement is purely contractual? Why

46 A signal was the deletion of the non-deliverable pledge (in German "Sicherungsübereignung") from the New Dutch Civil Code in 1992; for the isolated position of the "Sicherungsübereignung" in Europe see E.-M. Kieninger (ed), Security rights in movable property in European private law (CUP 2004).

47 S. van Erp and B. Akkermans, 'European Union Property Law' in Chr. Twigg-Flesner (ed), Cambridge Companion to European Union Private Law (CUP 2010) 173, 180 ff; S. Nasarre-Aznar, Eurohypothec & Eurotrust. Two instruments for a true European mortgage market after the EC White Paper 2007 on the Integration of EU Mortgage Credit Markets (ZERP discussion papers 7/2008), Zentrum für Europäische Rechtspolitik (ed), University of Bremen (Germany), 2008 <<http://www.zerp.uni-bremen.de/>> accessed 04 September 2012.

48 Whereas the Dutch Civil Code of 1992 acknowledges claims as an object of "goederen", German theory is still reluctant to qualify claims as "property". However, court decisions point into a different direction. The rights to withdraw under a given credit line can be seized by creditors under German law (BGH 29 March 2001, BGHZ 147, 193. Interestingly, the Dutch Hoge Raad denied the creation of such a property right (Hoge Raad, 29 October 2004, Nederlandse Jurisprudentie 2006, 203, van Erp (n 14) 1063.

49 Denied by the House of Lords in *Hunter v. Canary Warf* [1997] UKHL 14; A. Clarke and P. Kohler, Property Law (CUP 2005) 496f.

50 *Dollar Land (Cumbernauld) Ltd. v. C.I.N. Properties Ltd.*, House of Lords, 16 July 1998, [1998] UKHL 26.

51 *Bernstein of Leigh (Baron) v Skyviews & General Ltd.* [1978] Q.B. 479.

52 *Star Energy Weald Basin Limited and another v Bocardo SA* [2010] UKSC 35 –.

53 A. Clarke, 'Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework' (2006) 59 *Current Legal Problems*, 319; recently approved by *Lewis v Redcar & Cleveland Borough Council and Persimmon Homes Teeside Limited* [2010] UKSC 11.

should public declarations or public duties not exert effects on “third” parties in a mass society, like the FRAND-declarations in standardization processes⁵⁴ or licenses granted in publically funded large scientific research consortia? There is no reason why modern network contracts should not exert third party effects – following the example of restrictive covenants (contractual real burdens)⁵⁵ under the Himalaya clause⁵⁶ in English Law.⁵⁷ Vice versa, property rules do not necessarily need to be set in stone,⁵⁸ but can be as subtle as contractual obligations. There is need for a conceptual integration of the modern developments in standard property theory. Servitudes could serve as a historic model.⁵⁹ A move is needed away from a binary dogmatic thinking in terms of property versus contracts towards a reflection about expectations and intent.⁶⁰

(3) New Objects

New objects and new property rights beyond movables and immovables will characterize modern property studies. These new objects result from technological change (a), from societal change creating competing interests in the same object (b), and from the instrumentalization of property by public regulation (c). The following examples are necessarily not exhaustive, but purely indicative.

54 Ph.D.-thesis of A. Balitzki, *Patente und technische Normen – Zugangsmöglichkeiten für Normnutzer* (forthcoming 2013); H. Ullrich, ‘Patente, Wettbewerb und technische Normen: Rechts- und ordnungspolitische Fragestellungen’ (2007) *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)* 817.

55 *Tulk & Moxhay* [1848] 41 ER 1143 – leading case on restrictive covenants.

56 *Adler v Dickson* [1954] 2 Lloyd’s Rep 267, [1955] 1 QB 158 [Himalaya-clause].

57 F. Parisi, ‘The Fall and Rise of functional Property’ in D. Porrini and G. B. Ramello (eds), *Property Rights Dynamics* (Routledge 2007) 19, 30.

58 C. M. Rose, ‘Crystals and Mud in Property Law’, (Febr. 1988) 40 *Stanford Law Review* 577.

59 *Van Erp* (n 36).

60 A suitable starting point is a re-description of the German different handling of non-possessory security rights in movables in sequestration and insolvency. The reasons lie in the different rationalities sequestration and insolvency on the one hand, and different degree to protection needs of bank creditors and product sellers. A more frank and policy conscious explanation of the Supreme Court’s adjudication could help.

(a) Technological change

Informational property has been acknowledged in the digital and the biomedical environment.

aa) Virtual Property

On 2 February 2012, the Dutch Hoge Raad upheld a criminal conviction of 2009 for a theft of a virtual sword as “property”. While the sword is neither tangible nor material, the court acknowledged the intrinsic value to the 13-year-old gamer because of “the time and energy he invested”.⁶¹

bb) Body Parts & Genetic Information

The reasoning is similar to the person/property-interface of conflicts in the biomedical environment with regard to human body parts, and genetic information. While the English Court of Appeal still denied damages for the accidental destruction of sperm in 2009⁶², the German Supreme Court (BGH) decided in a similar case in 1993 that a juxtaposition of personnel and property interests justify the assignment of damages.⁶³ The same reasoning underlies the decision by the French Administrative Appeals Court in 2005 to award monetary compensation for a destruction of a store of surplus embryos.⁶⁴ Similar juxtaposed interests exist when personal patients’ interests collide with commercial interests of researchers and pharmaceutical industry with regard to the storage of tissues and fluids in bio-banks, and with regard to transplants. These cases are not only interesting with regard to how to conceive the delineation of monetary/non-monetary interests, they are interesting with regard to the resilience of the European legal fabric since legal presumptions and values differ widely.⁶⁵

⁶¹ The Telegraph, 11. Febr. 2012 <<http://www.telegraph.co.uk/technology/video-games/9053870/Online-game-theft-earns-real-world-conviction.html>> accessed on 04 September 2012.

⁶² *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37 (Court of Appeal, Civil Division).

⁶³ German Supreme Court of 9. Nov. 1993, BGHZ 124, 52.

⁶⁴ Cour Administrative d’Appel de Douai, 6 décembre 2005 (N°: 04DA00376); E. Nordin and S. Panis, ‘The Law on Sperm: Liability of Sperm Banks in Belgium’ (2011) 19 *European Review of Private Law* 309.

⁶⁵ C. Godt, ‘Intellectual Property & European Fundamental Rights’ in H. Micklitz (ed), ‘The Constitution[alization] of European Private Law’, *The Collected Courses of the Academy of European Law* (OUP 2013) (forthcoming).

b) Societal Change

aa) Time-sharing

One of the prime examples of novel fragmentation of rights, which is acknowledged Europe-wide, is time-limited interests in holiday homes by the Timesharing-Directive.⁶⁶

bb) Cultural Goods

Another interesting example is the “droit de suivre” introduced by European Dir. 93/7/EEC. It allows states to return illicitly trafficked cultural objects. While in Germany, the bona fide standard for the acquisition of cultural objects requires the submission of respective certificates (which usually prevents the bona fide acquisition of stolen objects), the Netherlands transposed the directive by introducing an explicit exception to the bona-fide-rule (Art. 86a NBW).⁶⁷ However, while the directive aimed to create a (public) “burden” on cultural goods in the public interest, national transpositions followed the domestic structures of the public-private divide, and opted for adaptations to each of their respective property acquisition rules.

cc) Native Title and Traditional Knowledge

Two other examples of new rights stemming from international law are the “native title” to land, and the title to dispose of the traditional knowledge and the genetic resources of indigenous communities. The “native title” has been in principle acknowledged by national courts and legislators in several jurisdictions, starting with the famous Mabo-case in Australia in 1992⁶⁸ (followed by the Native Title Act 1993),⁶⁹ the Delgamuukw-case in Canada 1997⁷⁰, and the South African Land Reform Act of 2004 (although declared unconstitutional for formal

⁶⁶ Originally Dir. 1994/47/EC of 26. Oct. 1994 (OJ EC L 280/82), renewed 2007.

⁶⁷ B. T. Hoffmann, *European Union Legislation Pertaining to Cultural Goods, Art and cultural heritage: Law Policy and practise* (CUP 2006); Carducci, *The Growing Complexity of Int'l Art Law: Conflicts of Laws, Uniform Law and Mandatory Rules, UNSC Resolutions and EU Regulations* (CUP 2006).

⁶⁸ Mabo No. 2 [1992] HCA 23 (High Court of Australia), overruling the earlier case: *Milirrpum v Nabalco Pty Ltd.* [1971] 17 FLR 141.

⁶⁹ Clarke and Kohler (n 49); H. Mostert, ‘Aboriginal Title’ in *Max Planck Encyclopedia of Public International Law* (OUP 2008).

⁷⁰ *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 (Supreme Court of Canada).

reasons by the South African Supreme Court in 2010⁷¹). The right to genetic resources and traditional knowledge is also acknowledged by international public law, first by Art. 8 Convention on Biological Diversity in 1992⁷², the latest document is the UN Declaration on the Rights of Indigenous Peoples of 2007. The challenge in both cases is that the holder of the right is a collective entity. Whereas the idea of fragmented property rights could accommodate the idea of overlapping “native titles”, the concept is not easily reconciled with the European continental idea of individual property. However, the pressure to recognize and accommodate these positions is rising. The most sensible proposition is a conflict of law approach, which applies – under conditions – the foreign assignments in the forum state.⁷³

dd) Access rights to recreational space

Urbanization has renewed the need for and the appreciation of (green) space, and jurisdictions have responded in various ways. While access rights to forests in Germany have a clear-cut administrative nature, Scandinavian countries acknowledged a public right to access (conditioned by “outside the range of vision”). A unique new self-standing right has been created in the UK by the Commons Act of 2006, which comes closest to the traditional idea of use rights of Allmende-meadows.

c) Regulatory Property

A significant shift occurred in the assignment of property rights as market conform regulatory instruments. Early examples are airport slots, spectrum rights and tradable milk quotas.⁷⁴ However, the highest profile recent example is emis-

71 On the act itself: H. Mostard and J. M. Pienaar, ‘Formalization of South African Communal Land Title and its Impact on Development’ in E.J. Cooke (ed), *Modern Studies in Property Law*, Vol. 3 (Hart 2005) 317.

72 And currently in the process of being developed into a WIPO-convention, see T. Kiene, *The legal protection of traditional knowledge in the pharmaceutical field* (Waxmann 2011).

73 G. Teubner and A. Fischer-Lescano, ‘Cannibalizing Epistemes: will modern law protect traditional cultural expressions’ in C. B. Graber and M. Burri-Nenova (eds), *Intellectual Property and Cultural Expressions in a Digital Environment* (Elgar 2008) 17; commented by C. Godt, [book review] *Kritische Justiz* (2012) 228.

74 For an excellent overview from airport slots to emission allowances see M. Colangelo, *Creating Property Rights* (Nijhoff 2012); prior inter alia M. Cardwell, ‘Milk and livestock quotas as property’ (2000) *Edinburgh Law Review* 168.

sion rights,⁷⁵ which were first introduced in the US as an instrument for SO₂-reduction, and which were later implemented in Europe in 2003 as a means of CO₂-reduction. In the future, refill batteries in E-cars will raise new property questions. These rights are hybrids between private property and public administrative law,⁷⁶ oscillating between claims and property. Respectively, member states have transposed the directives differently according to their national preferences: E.g. the European Carbon Emissions Directive 2003/87/EC⁷⁷ was transposed in Germany by a special administrative law,⁷⁸ whereas in the Netherlands, the Environmental Law Statute (*Wet milieubeheer, Wm*) was amended, and the NBW is additionally applied with regard to the transfer of rights.⁷⁹ Emission rights in Germany are conceived as registered claims,⁸⁰ whereas in Austria, the allowances are termed “certificates”, thus purposefully strengthening the property connotation.⁸¹ In Germany, the good faith rules are curtailed by also allowing the bad faith purchaser to acquire the allowance.⁸² In the Netherlands, the traditional causal transfer model⁸³ was changed by stipulating in Art. 16.42 *Wm* that neither the invalidity of the contract, nor the lack of proprietary entitlement of the seller, could affect the transfer once it had taken place. In other words, the rule introduces, to a limited extent, the abstraction rule into the Dutch system.

75 B. Lueg, *Ökonomik des Handels mit Umweltrechten: umweltökonomische Grundlagen, Instrumente und Wirkungen – insbesondere in der EU* (Lang 2010); S. Hentrich/P. Matschoss/P. Michaelis, ‘CO₂-Emissionsrechte auf der ersten Handelsstufe: Ansatzpunkte, Wirkungen und Probleme’ (2009) 32 *Zeitschrift für Umweltpolitik & Umweltrecht* 153; for the US-perspective Colangelo (n 74) chap. V.

76 Applying different rules to intra-community trade and trade with third parties, cp. Art. 12 and Art 25 Dir. 2003/87/EC.

77 Off. J. L 275/32 of 25.10.2003.

78 And the emission rights are conceptualised as primarily of „public nature“ (to which private law rules apply), R. Körner and H.-P. Vierhaus, *Treibhausgas-Emissionshandelsgesetz* (Beck 2005) No. 29; E. Sommer, ‘Die zivilrechtliche Ausgestaltung des Emissionsrechtshandels’ (2006) *Zeitschrift für Wirtschafts- und Bankrecht* 2029; S. Wagner, *Zivilrechtliche Aspekte des Handels mit sog. Emissionszertifikaten* (2007) *Juristenzeitung (JZ)* 971.

79 Art. 16.41 lid. 1 et seq. *Wm*; J. S. Kortmann, ‘De overdracht van CO₂-emissierechten nader beschouwd’ (25 May 2005) *Nederlands Juristenblad* 392.

80 Art. 16 sec. 1 *Treibhausgas-Emissionshandelsgesetz (TEHG)* of 8 July 2004, BGBl. I p. 1578, latest revision 21 July 2011, BGBl. I p. 1475.

81 *Austrian Emissionszertifikatgesetz (EZG)* of 30.4.2004, BGBl I Nr. 46/2004.

82 § 16 sec. 2 *TEHG*. The argument is that the vindication of the right is neither necessary (after the right is used) nor desirable for the public good, M. Maslaton, *Treibhausgas-Emissionshandelsgesetz-Handkommentar (Nomos 2005)* § 16, No. 12.

83 As stipulated in Art. 3:84 *NBW*.

All these diverging implementation rules aim at the same policy goal, here with regard to emission allowances: limiting the vindication of the right. For the differences in legal systems, instrumental means need to be different to achieve the common goal. This example shows that laws need not be identical in order to achieve the same goal. This is a novel lesson, which again shows the need for comparative analysis, and rebuts the harmonization assumption of the functional method. The opposite can equally be true.

V. Conclusion

Looking back to the starting point of the functional approach to comparative property law, we learnt three things: (1) In property law, the *paesumpio simultudinis* had the effect that comparative studies were for a long time not undertaken, (2) the functional method as such does not compel harmonization, but is apt to carve out cultural differences, (3) the functionalist method might help to sustain the balance (recognizing the inherent tension) between harmonization (universalism, safeguarding peace) and diversity (cultural differences, safeguarding identity). However, departing from a critical perspective on the debate we learnt that other challenges to property law are much more important and require a more profound investigation into the foundations of property law. The current societal turnover (internationalization[s], technological and social change) requires a reflection of how property rights function under these novel conditions and a reflection of newly emerging rights. This is the challenge for the new era of comparative property studies.

Article

Sjef van Erp

The functional comparative method in European Property Law – C. Godt Some comments

Sjef van Erp: Professor of Civil Law and European Private Law at Maastricht University, The Netherlands, Email: s.vanerp@maastrichtuniversity.nl

The legal map of Europe, when it comes to property law, shows above all diversity. We have, of course, the main distinction between Civil Law and Common Law, but neither of these legal traditions is of a unitary nature. Within the Civil Law, the French, German, Scandinavian and Eastern-European legal traditions can be distinguished, within the Common Law, the law of England & Wales is different from the law in the Republic of Ireland and next to Civil Law and Common Law we have the mixed legal jurisdictions of Cyprus, Malta and Scotland. Add to this the legal diversity which sometimes exists within a particular national legal system (e.g., due to historical reasons, differences in land registration systems) and the result is a very diffuse legal map. To these national layers of property law, we more and more must add a layer of European property law, i.e. property law emanating from the European Union, European Economic Area and the Council of Europe (resulting from the impact of the European Convention on Human Rights).

Since the 19th century property law systems have been territorially limited by only being applicable within a nation-state. At the same time these systems became rather static and inward looking. Consequently, private international law focussed on deciding in which territory a legal relationship should be localised. The clearest expression, to my mind, of this approach can be found in the writings of von Savigny in his *System des heutigen römischen Rechts*. In Volume 8 he writes:¹ “dass bei jedem Rechtsverhältnis dasjenige Rechtsgebiet aufgesucht

¹ F.C. von Savigny, *System des heutigen römischen Rechts* (Berlin: Veit und Comp., 1849), Vol. 8, par. 348. See also par. 366 ff. Cf. J. Gordley, *Extra-territorial legal problems in a world without nations: what the medieval jurists could teach us*, in: G. Handl, J. Zekoll and P. Zumbansen, *Beyond Territoriality. Transnational Legal Authority in an Age of Globalization* (Leiden: Martinus Nijhoff Publishers, 2012), p. 35 ff.

werde, welchem dieses Rechtsverhältnis seiner eigenthümlichen Natur nach angehört oder unterworfen ist".² He adds, several pages further on, regarding property law:³ „Indem wir jetzt zu den Rechten an einzelnen Sachen, oder den dinglichen Rechten, übergehen, um das Rechtsgebiet, dem sie angehören, zu ermitteln, werden wir schon durch den Gegenstand derselben zur Bestimmung dieses Gebietes hingeführt. Denn da ihr Gegenstand sinnlich wahrnehmbar ist, also einen bestimmten Raum erfüllt, so ist der Ort im Raum, an welchem sie sich befinden, zugleich der Sitz jedes Rechtsverhältnisses, dessen Gegenstand sie sein sollen. Wer an einer Sache ein Recht erwerben, haben, ausüben will, begiebt sich zu diesem Zweck an ihren Ort und unterwirft sich freiwillig für dieses einzelne Rechtsverhältnis dem in diesem Gebiet herrschenden örtlichen Recht.“⁴ The applicable law is the law of the nation-state in which the property is located: the *lex rei sitae*. The focus is, therefore, on the thing itself: its physical presence, not on the right regarding the thing.

Rights, by definition, are however immaterial. To apply the *lex rei sitae* to rights, those rights must be “reified” and made equal to the physical thing on which they rest. When, in the past decades, the objects of property law more and more “dephysicalised” (“dematerialised”, e.g. intermediated securities or, more recently even, virtual property) this intellectual connection with physical things no longer was possible. With more and more scholars it is raising awareness that even regarding the traditional objects of property law (land, movables), also in light of digitalisation of (land) registries and the possibility of electronic conveyancing, the focus perhaps should be more on rights than on the physical object. This growing awareness of the tendency towards dephysicalisation is particularly relevant for the integration of the European internal market, as this also affects the way we may now approach transactions regarding movables and even land. The focus of such transactions is no longer exclusively on their object (movables, land) but on the right regarding those objects. Transfer of a good or of land is not a transfer of the object, but of the right resting on that object and this right is, as

2 In English translation: „that for every legal relationship the legal area should be found, to which this legal relationship belongs or is subjected according to its own nature”.

3 Von Savigny, *System des heutigen römischen Rechts*, Par. 366 (“Sachenrecht”, absolute rights regarding tangible property).

4 In English translation: “Continuing with rights on specific things, or real rights, to decide which legal area they belong to, we are already guided to their destination by their object. Because their object can be observed in the physical world, in other words: is filling a particular space, consequently their location is in the space where they are, at the same time the seat of that legal relationship, the object of which they should be. Who wants to create, have, enforce a right on a thing, for this purpose goes to their location and subjects himself voluntarily to the in this area applicable local law for this individual legal relationship.”

such, non-physical or dematerialised. Although goods may cross borders, land certainly cannot, but rights on land can, because they follow the person who holds the right even when passing a border! This may greatly facilitate cross-border transfers, as these are more and more done by electronic means, thus strengthening the development towards the dephysicalisation of property law. The traditional *lex rei sitae* rule, which connects rights regarding a thing to the location of that thing no longer functions efficiently in a dephysicalised, digital world. New conflict of laws approaches will have to be found and within the European internal market the new approach, it is suggested, could very well be the doctrine of mutual recognition. Rights, validly created under the law of a Member State, would then be valid all over the internal market. As a consequence private international law would, ultimately, only be relevant for legal relationships connected with the “external” market (i.e. outside the internal market of the EU).⁵ This might for more traditionally educated and trained lawyers feel like an “Umwertung aller Werte” and hence may be met with fierce resistance. There is, however, no point in denying the new reality of economic, political and legal integration, both regionally within the EU and world-wide (globalisation), enhanced by the incredibly fast growth of digital and Internet technology. The nation-state, in this approach, no longer by definition is a legal space within which, to give but one example, conveyancing services regarding e.g. immovable property are securely shielded from the providing of services by those who, from a 19th century perspective, were the “outsiders” (i.e. coming from another national jurisdiction).⁶

5 See R. Michaels, *The New European Choice-of-Law Revolution*, *Tulane Law Review* 2008, p. 1607 ff.

6 Cf. my editorial *The New Succession Regulation: The *lex rei sitae* in need of a reappraisal?*, *European Property Law Journal* 2012, p. 187 ff. In this editorial I argued that the *lex rei sitae* may be in need of a reconsideration, given the fundamental changes we now see, which require the, in my view, inevitable analysis whether what we inherited from 19th century legal thinking still applies today. I focussed on the recent EU Succession Regulation, (EC) 650/2012, particularly the position of land registries in light of the adaptation of foreign real rights, as laid down in article 31 of that regulation. That the problems to which I referred in that editorial, resulting from a non-acceptance of the impact of economic integration and the need to follow an integrated and unitary approach to dealing with a cross-border succession within the EU, are not the outcome of a prejudiced methodology, lacking academic scrutiny, can be seen in B. Hess, C. Mariottini and C. Camara, Note: Regulation (EC) n. 650/2012 of July 2012 on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, report PE 462.493, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Legal Affairs (Brussels: European Parliament), 2012, where it is stated on p. 16:

“The actual possibility for the authorities of a Member State where property is situated to determine – if at all possible – which is the closest equivalent right in rem to the right claimed

Today's property lawyers must not only follow these developments, but, must be involved in what German scholars call "vordenken": think ahead and prepare the legal framework from which these new developments can be evaluated and regulated, taking a balanced view on the interests of all those involved: European citizens as well as conveyancing experts. Analysis of present day reality should precede evaluation, not the other way around. In her presentation Christine Godt gave a good and clear view as to how such a realistic analysis, followed by a critical evaluation, could look like.

She also showed another fundamental aspect of present-day property law. The functional method works both ways: it focuses on convergence and divergence at the same time. The latter aspect is sometimes forgotten and it is particularly this aspect which is highly important for property law. From a functional perspective the various layers of property law in the EU can be examined on the basis of how they solve comparable problems in a comparable way. At the same time the functional method shows that divergence is unproblematic as long as it is realised that divergence of techniques does not by definition imply divergence as to result. This seems to be ignored in the debate regarding the scope of application of the Succession Regulation (is it of universal application or are land and houses governed by the law applicable to the land registry?), particularly by those who would like to preserve the 19th century *status quo*, while denying the impact of European integration and a rapidly developing internet technology. Territorially different legal systems may, even today in the EU, preserve their diversity, if only the awareness exists that from a functional viewpoint the

under the *lex successionis* may not be possible in the first place. Assuming the right claimed is, as in the example put forward by the Commission, an usufruct, the State where the property is located would have to go at lengths to determine the closest equivalent national right in rem, in a process which may turn out to be costly and time consuming. Moreover, assuming that the authorities could agree on which national right in rem is closest to the right claimed under the *lex successionis*, there is no requirement to change the domestic law on registry rules to show that ownership of the property was subject to the usufruct. *Hence, the usufruct would be effective but not publicised in the local register.* (Italics are mine, SvE). This could clearly promote uncertainties as to the legal status of the property especially towards third parties, with the result of increasing the chances of difficulties or disputes if the land is later sold to a third party.

The main problem in this respect is the delineation between property and succession law. According to its Article 23 (1) lit e) the Regulation governs the law applicable to the transfer of the assets, rights and obligations forming part of the estate to the heirs. However, in some Member States, the transfer is qualified as a transaction of rights in rem and not as a transfer succession."

Hess (et al.) in their footnotes make a further reference to House of Lords, European Union Committee, Sixth Report: The EU's Regulation on Succession, 9 March 2010, esp. par. 77 ff. and Laukemann, in: Hess/Jayme/Pfeiffer, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 36 ff.

differences are gradual and not fundamental. If the land registration system of a particular country functions well this does not mean that a land registration system of another country that uses a different technique – as if it were: by definition – cannot function equally well. Unfortunately, sometimes experience shows that the focus of more traditional property lawyers is still so much inward looking that it even may give rise to a feeling of animosity towards those who challenge their approach, or, even worse, results in an argument along the line of: “Was nicht sein darf, das nicht sein kann!” (what should not be, cannot be)⁷ This is not the way to proceed. Christine Godt’s final remark that the “current societal turnover (internationalization(s), technological and social change) requires a reflection of how property rights function under these novel conditions and a reflection of newly emerging rights” and that this “is the challenge of the new era of comparative property studies” is a far more open and, it is submitted, productive approach. It is the way forward!

⁷ Quoted in R. Schütze, when discussing the conceptual polarisation ‘confederation’ versus ‘federation’ in the European tradition, compared with the American tradition: *From Dual to Cooperative Federalism. The changing structure of European law* (Oxford: Oxford University Press, 2009, paperback edition 2013), p. 32.

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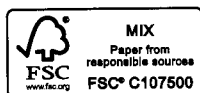
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