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Stability and Defence of Property Rights

in the context of transition economies



Property Rights

1. A well-functioning market demands a stable, certain and secure property law.
2. It is not necessary to precisely define every concept; it is sufficient if certain concepts are notions. An example is the French approach to what constitutes “ownership”. This allows courts to develop the law, as recently the French Supreme Court did.
3. A balance will have to be sought between protecting (1) ownership (Cf. French C.C.), (2) commerce (cf. the German C.C.) and the general interest. In a transition economy the general interest concerns particularly a transparent process of privatisation.
4. Western legal traditions are based on a common ground pattern. They share the aforementioned values of stability, certainty and legal security, are based on well-balanced policy choices and have certain principles (*numerus clausus* of property rights, transparency and hierarchy) and ground rules in common.
5. A stable ownership regime demands application of the *numerus clausus* and a clear demarcation between private and public law. No ownership regime creates complete freedom for the owner, public law will frequently have an impact on ownership. However, if public law becomes too prevailing, in fact a gradual process towards re-nationalisation is taking place.
6. Ownership is directly connected with the object concerned. Only certain objects can be “owned”. A prime example of this approach is the German C.C. This is, what might be called, the *numerus clausus* of legal objects. Can the definition of ownership be disconnected from the list of historical objects (mostly: tangible objects) and made applicable to virtual property?
7. Ownership can have different meanings, depending upon the context. This can be the legal regime: private law (Civil Code), public law (protection against expropriation) and international public/investment law. The context can also be the object under discussion: tangibles (movables, immovables), intangibles and virtual property.
8. Land ownership and land registration are closely connected. There is a tendency towards a more positive system of land registration.
9. The impact of digitalisation and the Internet should not be underestimated. New technologies, such as block chain, can create systems of land transfer which are only governed by pre-set rules, laid down in algorithms.
10. As long as ownership is unclear, third party protection rules remain of vital importance, both with regard to movables and immovables. The same applies to prescription periods.

Property Rights

- What do well-functioning property law systems have in common?
 - Values
 - Principles
 - Ground rules

Property Rights

- Values
 - Stability
 - Certainty
 - Security

Property Rights

- Principles
 - Numerus clausus
 - Transparency
 - Hierarchy

Property Rights

- Ground rules (1)
 - (a) “Nemo dat” (“nemo plus”)
 - (b) Potior iure (exception: ownership)
 - (c) Limited rights have priority over “fuller” rights
 - (d) Special protection (“revindicatio”)

Property Rights

- Ground rules (2)
 - (e) Third parties can only be bound by negative, not: positive, burdens
 - (f) No secured claim, no security right
 - (g) Validity of property rights is decided ex ante, not ex post

Property Rights

- Objects of property law
 - Numerus clausus
 - Tangible property
 - Intangible property
 - Digital data

Property Rights

- Types of property rights
 - Primary
 - Secondary
 - Use
 - Security
 - Management
 - Tertiary

Property Rights

- Levels of ownership
 - Which legal regime?
 - Private law
 - Public law
 - EU law (cf. art. 345 TFEU)
 - Investment treaties/Free trade areas
 - Human rights law
 - Which object?

Property Rights

- Private law ownership as “notion”
 - Balancing protection of
 - ownership, commerce and economic interests
 - What has priority: private ordering or public interest?
 - Numerus clausus as principle or rule? (cf. French Supreme Court)

Property Rights

- Redress of lacunae
 - Third party protection
 - Prescription
 - Insurance

Property Rights

- The impact of transition (1)
 - Economic changes
 - Resulting legal changes
 - Private law framework
 - Property law
 - Ownership
 - Land registration

Property Rights

- The impact of transition (2)
 - The IT Revolution
 - Digitalisation
 - Internet (interconnectivity)
 - New technologies (e.g. block chain)
 - Impact on, e.g., land registration systems

Property Rights

Concluding remarks