

Property Law Perspectives II

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Ius Commune Europaeum

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INTRODUCTION TO PROPERTY LAW PERSPECTIVES II

1. Introduction

In November 2008 a group of young property law researchers met informally during the annual conference of the *Ius Commune* research school in Amsterdam and spoke about closer future cooperation in the field of property law. It was clear for those present at the meeting that this would have to be something permanent and flexible, allowing new researchers to join and older researchers to remain connected. These young researchers wanted to create a network for property lawyers in which younger researchers have a safe environment. By linking it to senior and therefore more experienced property law scholars, willing to share their knowledge and expertise, this network would link the entire property law community.

The 2008 initiative became the Young Property Lawyers Forum (YPLF) and started with great success with a small conference in May 2009 in Edinburgh, Scotland. It was modest as it mostly included speakers and participants from Maastricht and Edinburgh. In 2011 we scaled to a larger level when the second edition of the YPLF took place in Maastricht with participants from Maastricht, Leuven, Edinburgh, Oxford and Stellenbosch. It led to the first publication of the YPLF contributions under the title *Property Law Perspectives*.

The South African Research Chair on Property Law – held by Prof André van der Walt – hosted the third edition of the YPLF in November 2012 at Stellenbosch University's Institute for Advanced Study and was a conference of a larger scale. Speakers from all over the world joined for a two-day conference where over 30 participants presented papers. Besides this very successful gathering, we added a Master Class in which a number of senior property scholars presented parts of their latest research. The YPLF and Master Class were closely linked and co-organized by Dr Ernst Marais of Stellenbosch University (now at the University of Cape Town) and Dr Bram Akkermans from Maastricht University. A word of thanks goes to our sponsors, as these events could not have taken place without their generous sup

port: the South African Research Chair in Property Law, the Division for Research Development at Stellenbosch University as well as the Faculty of Law of Stellenbosch University.

We are now proud to present the second volume in the *Property Law Perspectives* series, in which participants from both the third YPLF edition as well as the Master Class present their papers. We are very pleased of the result and hope to have started a tradition that can last for many years to come. In November 2013, the fourth edition of the YPLF will take place in Leuven, Belgium. We plan to publish the papers of this gathering in a *Property Law Perspectives III* volume.

2. Property Law in Development

With this book we emphasize the law of property as a developing legal field. There are three aspects of this development that deserve attention. First is the growing importance and relevance of constitutional property law. Property scholars are progressively looking at the interrelation and – especially – the effect of constitutional law on private law.¹ Examples in this regard include developments under the South Africa property clause, the impact of Article 1 of the First Protocol to the European Convention of Human Rights (ECHR) on the legal systems of Member States of the European Union as well as the jurisprudence under the 5th Amendment to the US Constitution. More and more scholars are saying that ‘private law’ property law must also conform to the constitutional order. Examples of such developments are the *Pye* decision, where the European Court of Human Rights considered the constitutionality of adverse possession (the common-law equivalent of acquisitive prescription).²

A further development in property law concerns the search for flexibility. Where the classical model of property law emphasizes limited party autonomy in favour of legal certainty, modern property law scholars pursue flexibility.³ This concerns the combination of existing property rights, the creative use of property rights as well as the creation of new types of property rights.⁴

Finally, greater attention is paid to the role of party autonomy in property law, which concerns the search for the limits of property law.⁵ These limits can entail existing types of property rights, which link up to the second development, but also the creation of new sorts of arrangements or the combination of property law and contract law to achieve results that would otherwise not be possible. A good

¹ See, recently, Van der Walt 2012.

² *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3; (2008) 46 EHRR 45. See, on this case, Marais 2011, chapter 5.

³ See, Van Erp 2009, p. 1517 *et seq.*

⁴ See, on this, Akkermans 2008, p. 385 *et seq.*

⁵ See, for example, Westrik & Van der Weide 2011.

example in this regard is security servitudes, by which a *de facto* positive burden is created.⁶

3. Contributions in this Volume

The contributions to this volume are divided into four categories, which correspond to the developments in property law set out above: (I) constitutional property law; (II) concepts of property law; (III) developments in property and property theory; and (IV) private law property law.

The contributions in part I of this volume show that property law is not merely confined to private law but that it has intricate connections with – and is influenced by – various aspects of constitutional law. As the contributions by Sabrina Praduroux and Eveline Ramaekers illustrate, the right to property in the sense of Article 1 of the First Protocol to the ECHR comes into contact with private law property law and private international property law. Against that background, Susan Bright's contribution focuses on the specific and topical case of possession proceedings in the context of housing. If we move the focus from Europe to South Africa we see that, due to the impact of the property clause in the South African Constitution, property law and constitutional law have always been intricately connected. Issues concerning the use and distribution of land are particularly prevalent and sensitive, as Björn Hoops' and Jeannie van Wyk's contributions on customary land tenure and fracking respectively demonstrate.

The contributions in part II shed a new light on deeply rooted – and sometimes seemingly unchanging – concepts of property law. The papers written by Sofie Bouly, Ann Apers and Shaun Charlton revolve around the concept of 'immovable': when is an object immovable? Can an object still be classified as an immovable even though in practice it actually moves? How can property rights be created in relation to objects, which are technically part of the land and therefore part of the ownership of the land (*in casu*: trees)? Dorothy Gruyaert's contribution explores so-called third-party accounts in Belgian law, which find their counterpart in certain types of English trusts. Given that English trusts draw heavily on equity, a system of law unknown to the Belgian legal order, accommodating third-party accounts in a civil-law system presents unique challenges. Brendan Edgeworth's paper concerns the contractualization of leases, which once again emphasizes how leases do not quite fit into either contract law or property law. Whereas civil-law jurisdictions tend to classify leases as a contractual relationship with certain proprietary protection, Edgeworth shows that in common-law systems the law on leases – a lease originally being an estate in land – provides a growing number of contractual remedies.

Joseph Singer's and Bram Akkermans' contributions in part III pay renewed and innovative attention to property law theory. Joseph Singer demonstrates that,

⁶ See on these Akkermans & Swadling 2012, p. 267.

while property law is often thought of as consisting of rigid rules meant to maintain clarity and predictability, in practice property lawyers 'care not only about clarity but about getting it right'. According to Singer, various rules of reason help us to get it right. The combination of standardization theory, with notions of the *numerus clausus* or *numerus apertus* of property rights in Bram Akkermans' contribution, sheds fascinating new light on content that private parties should (or should not) be able to give to property rights and the effect this would have on third parties coming into contact with property rights in some way. The impact of the autonomous creation of property rights on third parties is perhaps perceived more negatively than would actually be the case.

Finally, part IV turns to roots of property law, in which these excursions to explore the boundaries of property law are safely anchored. The contributions by Mitzzi Wiese, Gerrit Pienaar, Valérie Tweehuyzen and Elien Dewitte respectively cover areas ranging from retention of title clauses and the fragmentation of property to the principle of indivisibility and factual universalities of goods.

By way of conclusion we would like to thank all those participants of the third YPLF as well as the Master Class who submitted contributions for publication in this volume. Without your kind help and support this second volume of *Property Law Perspectives* would not have been possible.

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