

Property Law Perspectives III

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PREFACE

1. Introduction

In May 2009 the Young Property Lawyers Forum (YPLF) took place for the first time in Edinburgh, Scotland. The Forum was initiated by a group of young property law researchers who had met through the Ius Commune Research School and its annual conferences. The main purpose was to create an international platform for closer cooperation in the field of property law. The first small-scale edition was very successful and led to the YPLF becoming an annual event with conferences taking place at Maastricht University (2011), Stellenbosch University (2012), the University of Leuven (2013) and Wadham College in Oxford (2014). With each edition the network of young property lawyers has grown and in a short span of time the YPLF has firmly established itself as a great opportunity for young researchers to present their research in an informal setting, as well as to receive comments from peers and experts in the field of property law from all over the world.

The contributions from the second meeting at Maastricht University in 2011 were published under the title *Property Law Perspectives*. The contributions from the 2012 YPLF edition, hosted by the South African Research Chair in Property Law at Stellenbosch University, were bundled as *Property Law Perspectives II*. This book forms the third volume of the Property Law Perspectives series and contains the papers presented in 2013, when the Institute for Property Law of the University of Leuven organised the fourth YPLF.

2. Property law in development

Although it is often perceived as static, property law has become a constantly developing field. Changes and developments are influenced by many different factors, both from within the national legal systems and from outside. In general, one could state that these developments have as a consequence that property law leaves its isolation and has to interact more with other fields of law (such as constitutional law, law of obligations, contract law, family patrimonial law). Property law requires a general knowledge of private and public law and has a dialectic relation with these other fields of law.

One of the elements causing change is the increasing role played by constitutional property law. In South Africa section 25 of the constitution, which is the property

clause, impacted the field of property law heavily since its introduction in 1996 and in Europe the influence of art. 1 of the First Protocol to the European Convention of Human Rights has known a vast expansion in recent decades. Various contributions by South African and European authors will discuss different aspects of this influence of constitutional law on property law.

A second element causing property law rules to be questioned and examined is the ever-changing social and economic environment. New forms of valuable assets arise which do not always fit easily into existing classifications. The economic markets demand flexible and efficient security rights for credit providers. Increasing demand for resources such as energy puts traditional methods into a new perspective. Current and new forms of registration are being evaluated with changing land use and ever growing digitalisation of registers in mind. All these situations exemplify that the traditional property law solutions both with regard to movables and immovables may not suffice in a changing world, which provides inspiration for research.

3. Contributions in this volume

In the following we give a short overview of the different contributions and their summary.

Part I deals with constitutional property law.

Björn Hoops discusses the non-binding Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, which were issued by the Committee on World Food Security (CFS) in 2012. These Guidelines contain provisions on how an expropriation procedure should be designed in order to ensure that it is fair, transparent and participatory. His contribution examines what model of transparent and participatory expropriation procedure the Guidelines propose, what benefits this model might have and what impact the non-binding Guidelines are likely to have on the laws and policies of the States.

Marilie Van Wyk examines whether the new South African Draft Tenure Security Policy and Draft Land Tenure Security Bill exacerbate the unresolved problems that may still exist with the Extension of Security and Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996. Furthermore she discusses the effect the proposed Land Tenure Security Bill might have on planning legislation, as land is considered to be the core ingredient of planning.

Mieke van der Linden focuses in her contribution entitled 'New Imperialism on the African Continent' on the relation between European territorial acquisition and the native land tenure. During the 'Scramble for Africa' the whole continent was brought under the rule of the European colonising powers. The predominant line of reasoning of the Age of New Imperialism was from communally held lands, to individual rights of using this land, to, finally, individual proprietary rights with regard to specific pieces of land. In this respect, communal tenure of land was considered to entail a lack of advancement or an 'early state'. In her chapter the author answers the question of what (the right to) property of land entailed from the European and African perspective within the spatial and temporal context of the Age of New Imperialism. She finds that

the unjustified employment of private legal concepts into the public legal sphere became a precedent of numerous boarder transgressions between the private and the public.

Sjur Dyrkolbotn discusses the case of expropriation of Norwegian waterfalls for hydropower development in the light of the European Convention of Human Rights. It is interesting to see that the Court of Human Rights has recently put emphasis, not only on the owners' right of compensation, but also on the owners' right to take part in the management of their property and to ensure that the use that is made of their property is consistent with their convictions. This may be of great influence to the jurisprudence of the Norwegian Supreme Court.

The second Part discusses current developments in property law at the national level of several different jurisdictions.

In his contribution, Wian Erlank determines the property of virtual property. In order to answer the question whether all (virtual) objects in a virtual world can be seen as virtual property and as such will be protectable as property in the real world, he investigates the features of virtual property.

Marda Horn subjects the development in South African case law of the distinction between real and personal rights to a critical examination. As South Africa is a jurisdiction that is not familiar with a closed category of real rights, the distinction and the delineation are of high importance, making the evaluation of the currently used test all the more relevant.

Emma Lees discusses the changes brought by the Land Registration Act 2002. The Act has just passed its ten-year anniversary, and there is potential for reform, as the substantial effects of registration are sometimes unclear. The author examines the meaning of the state guarantee of title, considering the case law concerning the effect of registration to date. She raises the question to what extent the off-register situation impacts upon the degree to which title is guaranteed by the register.

Tshilidzi Norman Raphulu discusses the acquisition under South African law of a right of way in case of a landlocked property, a right of way of necessity. He examines the different phases in the process of an acquisition, clarifying the role of a court order and evaluating the need for registration.

The third and last Part examines property law questions in a European and international perspective.

Merel Heilbron made a comparative analysis of the effect of the lien against third parties, namely against other secured creditors of the debtor and against the owner of the good that is being retained. The lien seems to question the traditional distinction between the law of obligations and property law, as well in Dutch law as in Belgian law. The question to what degree the lien is a right in rem according to the European Insolvency Regulation on the one hand and according to Belgian and Dutch law on the other hand requires a different answer.

In the next chapter, Rafael Ibarra Garza discusses the complex comparison between the French *fiducie* and the English law on trust. In order for the recent introduction of the *fiducie* to be successful, the key issue according to the author is the adequate protection of the beneficiaries. The protection of the beneficiaries' rights depends on the protection of the trust estate. This chapter discusses therefore the legal means by which the trust fund is protected in both legal jurisdictions.

The contribution of Francesca Fiorentini touches upon a recent development in property law from an international perspective. The chapter focuses on the global art market. Due to inefficiencies and to the divergences between the national legal systems, illicit traffic in cultural property flourishes. While the global character of cultural property creates a 'multilayered' and 'de-centralised' structure of the sources of law, it calls for new mechanisms of protection against illicit traffic in cultural objects. One of the main challenges in this respect seems to be how to reconcile the idea of an economic value of cultural property, entailing a licit tradability of culture, on the one hand, with the protection of cultural rights of individuals and communities, on the other hand.

In the last contribution Shaun Charlton compares the classification of factory machines bought under a hire-purchase agreement in England, France and Germany. The classification is vital to solve the conflict between a creditor with a hypothec on the factory building and the unpaid supplier in case of insolvency of the manufacturer. Furthermore, a change in factual scenario can affect the outcome of the priority conflict. The author examines different scenarios in the three jurisdictions to distinguish when the unpaid supplier takes priority over the bank and vice versa.

Following the Young Property Lawyers' Forum, a Master Class was held where senior property law scholars discussed different recent reforms in the law of property law. Professor Eric Dirix discussed the reform of security law in Belgium. This contribution was also added to the book. The Act of 11 July 2013 reformed the Belgian Civil Code and contains a profound modernisation of the legal framework regarding security rights on movables. The reform was to a large extent influenced by comparative law. The author gives a profound overview of what to expect under the new Act on movable securities.

By way of conclusion we would like to thank the authors for submitting their contributions, and all the participants for attending the fourth YPLF and the Master Class. It was a true pleasure to organise this edition, and we are looking forward to the next YPLF.

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