

# Property in Transformation

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This present volume explores recent changes in contemporary property law. The analysis uses the term “Regulatory Property Rights” as a means of identifying these changes since the most prominent examples of these pursue a regulatory goal. The term aims to detect the function of modern property and the societal changes involved. It broadly follows the connotation of Richard Steward’s use of the term,<sup>1</sup> and is not limited to privatized public utilities (cp. Kevin Gray<sup>2</sup>). Yet, colleagues have favoured other terms: Margherita Colangelo (2012) calls them “created property rights”, thus directing her focus to the fact that these rights are deliberately created for regulatory purposes, either by means of self-regulation or by public law.<sup>3</sup> Francesco Parisi (2005/2007) used the broadly equivalent term “functional property”.<sup>4</sup> Sabina Manea (2014) chose “instrumental property”,<sup>5</sup> thus pointing to the fact that we see “regulation by property”. Overall, the term encompasses fragmented, commodified use rights of private origin (digital rights in virtual objects and personal data, body parts, airport slots, freight forwards, labels) and of public origin (emission rights, biodiversity rights, concessions and public services).

Our research interest is focused on describing and understanding property in modern societies. The choice of the term “regulatory property rights” is *not* driven by the hypothesis that these rights can be distinguished from presumably “non-regulatory” property.<sup>6</sup> In contrast, if we acknowledge the lessons of

- 1 R.B. Steward, “Privprop, Regprop, and Beyond”, 13 *Harv. J.L. & Pub. Pol’y*, 1990, 91.
- 2 Kevin Gray assigned the term “regulatory property” to privatized utilities; see K. Gray, Regulatory Property and the Jurisprudence of Quasi-Public Trust, 32 *Sydney Law Review* 2010, 221–241. It is also distinct from “New Property” as coined by Charles Reich, *Yale L.J.* 1964, 733, who criticized US “government’s largess” of that time.
- 3 M. Colangelo, *Creating Property Rights*, Leiden/Boston: Nijhoff, 2012.
- 4 F. Parisi, “The Fall and Rise of Functional Property”, in: D. Porrini/G. Ramello (eds), *Property Rights Dynamics: A Law and Economics Perspective*, Routledge, 2007, 19–39 (also ssnr: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=85056](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=85056) [2005]).
- 5 S. Manea, *The Instrumentalization of Property – Legal Interests in the EU Emissions Trading System*, Alphen aan den Rijn: Kluwer Law Int’l, 2014.
- 6 In particular, the term does not reiterate the distinction of property under public law versus private law; for this debate see T. Regenfus 2013, p. 30 and p. 648, Fn. 1643; M. Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts*, Mohr Siebeck: Tübingen 2001, p. 383.

the social sciences since the mid-twentieth century, property has always been functional: It serves the effective distribution of goods and sets behavioural incentives to invest in conservation and capitalization.<sup>7</sup> Therefore, the term “regulatory property” is not descriptive, but programmatic with an analytic intent. It is programmatic in that it aims at a description of the property deliberately created or employed by public and corporate entities. Modern regulatory property rights follow the technical model of specialized property regimes set up in the late nineteenth century for intellectual property,<sup>8</sup> claims<sup>9</sup> and company shares,<sup>10</sup> which Christian von Bar labelled “pure normative things”.<sup>11</sup> It thereby relocates modern property reflection back in the frame of contemporary private law theory.<sup>12</sup> Analytically, the term shifts the focus onto how and why property is used. On the one hand, it directs attention to states substituting traditional command and control means with property while still pursuing the same public policy goals. Arguably universally recognized property allows for transborder policy coordination with other states, and because it is market-based, it is better suited to influence global production. On the other hand, attention is drawn to industry’s deployment of property rights as a novel way to control supply and distribution chains beyond contracts. Due to technologically driven dematerialization, digitalization and financialization, “rights to exclude” have emerged for all types of information and resources, combining transboundary regulation, measurable financial units and risk distribution. Regulatory property rights seem to be the result of the conversion of markets and nation states, responding to the pressures of the complex phenomenon known as “globalization”. While this phenomenon as such is not

7 *Pars pro toto*: For the sociologists: B.G. Carruthers/L. Ariovich, the *Sociology of Property Rights*, 30 *Annu. Rev. Sociol.* 2004, 23–46; esp. the contributors to “New Institutional Economics”: S. Galiani/I. Sened (eds), *Institutions, Property Rights, and Economic Growth – The Legacy of Douglas North*, CUP 2014; for the political sciences see only J.G.A. Pocock, *Virtue, Commerce and History*, Cambridge: Cambridge University Press, 1985.

8 Born as a means of competition law and industrial policy, intellectual property is today a settled property right, see Art. 17 Sec. 2 European Charter of Fundamental Rights, for the historic development C. Godt, *Eigentum an Information*, Tübingen: Mohr Siebeck, 2007, pp. 505 et seq.

9 Prime example: indorsement of the promise to pay, see M. Schmoeckel, *Rechtsgeschichte der Wirtschaft*, Tübingen: Mohr, 2008, p. 98.

10 Technically ‘transferable membership rights’, see R. Wilhelmi in this volume.

11 C. v. Bar, *Gemeineuropäisches Sachenrecht*, Vol. 1, München: Beck, 2015, pp. 309 et seq.

12 G. Comparato/H. Micklitz/Y. Svetiev (eds), *European regulatory private law – autonomy, competition and regulation in European private law*, EU1-Working Papers – Law 2016/06, download: <<http://cadmus.eui.eu/>>, last visited 18.4.2016.

new, deepening internationalization and accelerated technological change have profoundly altered our contemporary lives well beyond former trade relations. Property schemes participate in these developments, thus changing the lines of the public–private dichotomy.

These contributions were originally presented at a workshop at the Institute of Advanced Studies at the University of Konstanz, part of the university's "Cultural Foundations of Social Integration" Center of Excellence, in May 2015, and subsequently further developed. All papers are driven by the search for a better description of the modern metamorphosis of property. Their common research interest is focused on a better understanding of the drivers and the functionality of these emerging rights. The volume is organized along the five most evident lines of change: regulation, internationalization, individualization, financialization and dematerialization, the discussion of which is grouped into four chapters. The contributions are exemplary and do not aspire to exhaustively cover all rights which have emerged. Even the conceptual overview provided by the editor (Chap. 2) is not complete in that it only touches on topics such as intellectual property and proprietary claims regarding body parts. Since these variants of property rights have earlier been explored,<sup>13</sup> they were deliberately left out of the present volume.

The *first chapter* seeks a conceptualization of "regulatory property", and consists of two articles. Their common theme is the "regulatory turn", but they approach their *sujet* from two different angles.

*Christine Godt* aims at a broad overview. She departs from the observation that "Regulatory Property Rights" sit uncomfortably alongside traditional property principles. By the term "regulatory property rights" she does not only refer to those rights which have recently and deliberately become installed by state regulation substituting or complementing command and control. She also includes: property rights which are functionally instrumentalized by industry as a novel means of controlling supply and distribution chains beyond contracts, property rights juxtaposed to personality rights, intellectual property and proprietized contractual positions, like freight forwards, and *in rem* effects of licences. In contrast to the obvious assumption that novel regulatory property rights are distinct from traditional property, Godt submits that these rights shed light on the persistent functional core of property. She argues that property has always exerted a regulatory function in order to steer human behaviour. According to her argument, the essence of property is the assignment of the right to make decisions and not absolute control. The limits of this autonomy

13 C. Godt, *Eigentum an Information*, Tübingen: Mohr Siebeck, 2007; C. Godt/L. Guibault/G. v. Overwalle/D. Beyleveld (eds), *Boundaries to Information Property*, Cambridge: Cambridge University Press (forthcoming).

have always been defined by regulation. She attributes the emergence of novel property rights to the conversion of markets and nation states under the pressures of what has been dubbed “globalization”, and accelerated digital technological change followed by novel business models. In conclusion, she reformulates property principles to adapt them to the functioning of modern economies, whilst acknowledging the contemporary<sup>14</sup> public–private divide.

In her paper, “Control of global business transactions via property?” *Margherita Colangelo* focuses on those most emblematic examples of regulatory property which are installed by states in the pursuit of public policies, such as milk quotas, emission rights, airport slots and spectrum usage rights. For her, the two central features characterizing regulatory property rights are multi-level regulation, which interweaves in complex ways actors acting on different stages and legal levels, and creation by public authorities. These rights are scarce, have a high economic value and are intangible. She assigns legitimacy to private law to determine a property qualification according to its purposes (contract and tort) and rationales. However, her central argument is that the emergence of new goods implies a metamorphosis of property law. Property regimes are variable, and the holder’s prerogatives are different from those established under the Civil Codes. These rights are in need of regulation for various reasons, from the conditions of allocation and operation to life-span, revocation and the fine-tuning of design. This renders regulatory property rights instruments of a double public/private nature. Regulation, by way of “cherry-picking”, takes only those elements of property law on board which are strictly necessary to the pursuit of the public policy goal. Consequently, protection of these rights is not absolute, and must be balanced against the goals pursued; property theory must be adapted to secure the function of property as a valid tool. The scope of property, transparency, non-discriminatory allocation and market rules can neither be left to industrial self-regulation nor to jurisprudence. Sectorial multi-level regulation is required. By stressing the interconnection and complementarity of private and public law, Colangelo submits a most thoughtful and prudent analysis, which resists any simple categorization in terms of “either, or”.

14 H.-W. Micklitz/Y. Svetiev, The Transformation(s) of Private Law, in: H.-W. Micklitz/Y. Svetiev/G. Comparato (eds), *European Regulatory Private Law – The Paradigms Tested*, 69–96, p. 81: “The vanishing public/private divide triggers a process of re-establishing the public as against the private, of re-defining the responsibilities of the public and the forms of private ordering, which then lead again to an intermingling of the public/private. What we then get is an understanding of the public/private divide as no more than a snapshot of the times”.

The *second chapter* focuses on the reflection of internationalization of property law. *Sjef van Erp* reiterates the formerly unquestioned *lex rei sitae* principle as the universal conflict-of-laws rule for property relations. Departing from a comparison of US conflict-of-law adjudication and recent EU legislative activity with regard to successions and matrimonial property, he reflects on the inner rationales of the rule with regard to both technological change, and modified nation states' sovereignty. With regard to technology, he focuses on the digital revolution and discusses changes to registration schemes and digital property. The central theme of the article, however, is the question of the rationale of the *situs* rule under changing notions of state sovereignty. Here, he concentrates on the legal consequences which result from integrated systems which are similar, but not identical, such as those of the US and the EU: his chapter sheds light on the more fundamental question of identifying the legitimate reasons for submitting property relations to one or another legal order. Both streams of thought reconceptualize *lex rei sitae* and the *lex registrationis* as a tandem default rule which is open to modifications where technological change demands them, and where economic integration either requires or permits this.

*Jean-Michel Jude* explores the subtlety of the *lex rei sitae* rule in insolvency law. Insolvency is a culminating point in time at which property rights crystallize, and various interests collide. Not only do they concern the obvious interests of creditors and debtor; states have installed infrastructures to administer the process of insolvency, reflecting their public choices which calibrate competition and industrial policies. At the core of insolvency is the idea of a collective and egalitarian payment of all creditors. The technical centrepieces of this are the immediate relinquishment of the debtor's capacity to dispose of his/her properties, and the installation of an independent administrator for the sake of creditor's rights. Whereas the first European Insolvency Reg. No. 1346/2000 of 2000 still adhered to the *lex rei sitae* principle as the default rule, the reformed insolvency Reg. 2015/848 inverted both rule and expectation, installing the *lex fori concursus* as the default rule ('the law of the State of the opening of proceedings') and the *lex rei sitae* for cases of approved territorial secondary procedure upon request. The intentions of the reform of 2015 were threefold: to improve creditors' protection by limiting forum shopping, to enhance the possibilities for restructuring, and to install a procedure for group insolvency. At first glance, the new rule seems to impair the primary goal of equality of all creditors and Member States' sovereignty under Art. 345 TFEU. The second glance reveals that the static *sitae* rule gave debtors broad leeway to misuse. Jude describes the coordinating procedural approach and the possible multi-level combinations under the regulation, and reflects on the quietly

ongoing process of convergence in member states' insolvency laws, and most certainly in national property and securities laws.

*Leon Verstappen* focuses on the first international attempt to formulate governance rules for property titles in land, the FAO-Voluntary Guidelines on the Responsible Governance of Tenure 2012. While instigated as a response to current problems of land tenure in developing countries, ranging from land-grabbing to indigenous peoples' rights, the Guidelines universally apply also to developed countries, and at the end of the chapter Verstappen explores three interesting examples of developed countries' need to rework their own laws in the light of the Guidelines. Developed over a few years using a bottom-up approach and including a broad range of stakeholders, three formulated governance norms are of particular interest to "regulatory property". First, the central concept is the "legitimate tenure right". This approach adopts a constitutional way of thinking about the conflicting legitimate interests in land, and rejects the idea of a unitary ("absolute") property right. Second, governance structures of land tenure are not restricted to a horizontal (private-private) and a vertical (citizen-state) relation. Where transnational corporations are involved, a diagonal transnational relationship emerges which requires their home states to "play a role". Third, this role is not limited to the better protection of acquisition of land titles through the use of bilateral investment treaties, but to ensure that businesses meet their responsibilities, especially in cases of large-scale land acquisition. While these guidelines are non-binding soft law, funding institutions already require recipients to adhere to them.

The *third chapter* looks into the transformation of individuality, and comprises three contributions.

*Alison Clarke and Rosalind Malcolm* explore the conceptualization of modern property rights departing from the contentious issue of water use and management. They argue that, because of the nature and function of water, it is wholly inappropriate to treat it as a commodity: descriptively and normatively, it is more appropriately conceptualised as a "common treasury." However, they challenge the assumption that, if water is to fulfil its role as a common treasury, property as an institution is inimical to its management and regulation. Such an assumption is, they argue, based on an untenably narrow conception of property, centred on traditional absolute dominion private ownership, failing to take into account the broader spectrum of private, communal, public and state property interests. This analysis is inspired by a learned common law thinking about property rights, and a profound reading of Elinor Ostrom. Taking this broader view, some forms of property do indeed undermine water's function as a common treasury, but others can be used to uphold it.

*Hanri Mostert and Cheri-Leigh Young* analyse the South African legal frameworks for three land-related resources: water, land use, and minerals. They focus on the modern South African conceptualizations of these resources as state stewardship ("national asset", "public resource"), as opposed to private individual property on the one hand, and state ownership on the other. The principle was first devised for water, then adopted for minerals regulation and has recently been discussed for land. The article questions many settled beliefs of the common property discourse. Conceptually, it is firmly built on the idea that property has a behavioural function (i.e. "secure development finance") and that state regulation is "constitutive" to property right holders' ability to use the property. More important, though, are the reflections about the interface of private entitlement and public regulation: First, departing from a distinction of land redistribution and land restitution as two different methods of land reform, they dismantle the popular discontent with the pace of land reform as a path-dependent "narrative of failure" motivated by politics. They submit that privatization actually has occurred, partly successfully by restitution, partly without the state and without formal entitlements which are traditionally conceived as necessary conditions for a market. On the one hand, this observation shifts the spotlight onto severe difficulties in restructuring economic assets, and on the other hand it questions the weight of formal titles compared to collectively shared social practices. Second, Mostert and Young submit that "regulated property" is tenuous "where the state cannot be trusted to secure individual positions through administrative regulation". Their criticism is not directed at the state failure to redistribute land, a question which they, together with other prominent property scholars, deem irrelevant. Their criticism focuses on the South African state's failure to secure access to water. This latter goal would only be achievable if government expertise and a constitutionally sound balance of propriety rights were systematically combined, thus fostering and sustain initiatives in water-control measures.

*Colin T. Reid* in his contribution "Employing Property Rights for Nature Conservation – Potential and Challenges" focuses on the interface of property-based environmental instruments between commodification as the source of nature destruction and the potential to integrate environmental policies into market-based instruments. He explores liability for harming and reciprocal payments for providing ecosystem services, conservation covenants/easements and biodiversity offsetting. He identifies the greatest challenge in this area to be the maintenance of overall eco-systematic coherence, which is made difficult by the 'fragmented parcels' approach to land property. The greatest potential lies in long-term arrangements, and broader participation



and initiative in nature conservation. His point of departure is to distinguish property and the market system: Property rights may be necessary for a market, but inversely, property law can play a role without adopting market-based schemes. His central point is that nature as an object of property rights is not always substitutable, transferable or economically valuable. Therefore, the situations in which property rights are functional for nature conservation need careful delimitation. He identifies two functional areas in which property rights can be effective for nature conservation. As far as a market is to be installed (1), he argues that property rights might be functional as a global response to climate change. As far as long-lasting relationships are to be construed (2), independent of single owners, property law may help to regulate the relationship of inhabitants to the physical world. It is unclear whether Colin Reid adheres to an ecocentric or anthropocentric approach to environmental law. Yet, he pursues a reasoning which inscribes environmental reasoning into economic institutions, and adopts a language close to Gregory Alexander's formula of "human flourishing". Reid substitutes the old "dominium" rationale with a reciprocal network dependency model. Considering these differences to classical property law, Colin Reid calls for a thoughtful interconnection of property and regulation to make innovative conservation law effective.

The *fourth chapter* of the book turns to the societal changes of financialization and digitalization, and presents three concrete examples of modern proprietary positions. *Rüdiger Wilhelmi* looks into the energy sector and explores emission allowances and derivatives based thereupon. His point of departure for the analysis of "regulatory property" builds on the writings of Colangelo, who departs from the melange of limitations and creations of property embedded in the dual terms of giving and taking of property. He illustrates the process of commodification and financialization using the example of the development of securities and securities markets. At the centre of his argument, he reiterates the commodification and financialization of electricity to date through three energy law packages that try to create regulatory property in a broader sense by securing the factual and economic preconditions for the creation of electricity rights by private law. Against this backdrop, he submits carbon emissions trading to a discussion on dysfunctional market mechanisms in this area which he relates specifically to the initial allocation of emission allowances. Inversely, he argues that the legal problems connected with the trading of allowances and derivatives based on them can largely be solved by employing the regulation which concerns securities and similar rights that are traded on capital markets. While these rights do not constitute anything exceptionally new, they have expanded the rationales of capital markets.



*Christine Godt and Jonas Simon* look into *in rem* effects of non-exclusive licences in insolvency. Licences grant use rights for immaterial property. Whereas exclusive licences are commonly qualified as proprietary in nature, simple licences have largely been conceived as contractual. Yet, their status in insolvency and bankruptcy, especially of the licensor, has remained contested and varies widely across jurisdictions. Recently, European jurisdictions like the Netherlands and Germany have recognized *in rem* effects of simple licences under specific conditions, following – on their own terms – the example of Japan and the US. The central rationale is that macro-economic effects outweigh the interests of creditors. Yet, the structures of the protection of (sub-)licensees in insolvency vary considerably and often camouflage the balancing exercise of the underlying policy decision between the protection of the creditors, market clearance and market protection. The article argues that these trends towards attributing proprietary positions which are justified by the digitalization of markets reflect a metamorphosis of property. The classical separation of *in rem* and *in personam* rights has evolved into a distinction of various groups and market stages, and a differentiation of their protective needs. Opposing economic interests become reconceptualized as positions demanding respect and which cannot simply be subject to an all-encompassing dominium. In this sense, the metamorphosis of property is in essence a constitutionalization of property and reflects the democratic change in a society to which a dynamic, fine-tuned case-law approach is better suited than a dogmatic one.

*Viola Heutger* in her article explores derivatives in the freight-shipping market. She reiterates the historic development and the reasons for the emergence of these financial instruments in this time-honoured business, which has been since antiquity been notorious for its inherent risks. Based on a description of the modern seaborne freight transfer industry, which is composed of multiple actors engaging either in the provision of ships on one hand, or in the trade of goods on the other, she focuses on the evolution of the modern forms of financing trade by derivatives. She carefully reiterates the development from essentially bilateral freight-shipping contracts negotiated under pure private autonomy, into schemes of industrial self-regulation, which are now evolving into exchange platforms mimicking capital markets, with public interference from regulation. While the commodification of claims was originally instituted by endorsement (as described by R. Wilhelmi in this volume), the commodification of contractual risks became possible with the adoption of standardization processes inside the industry (trade in freight units substituting service contracts), and through anonymous trade, first carried out via clearing houses and later via public exchange. These forms emerged due to the increasing risks of this especially volatile market, embodied in foreign exchange rates, interest rates,

fluctuating bunker prices and vessel value prices. The essence of modern financial instruments is risk-spreading, thus supplementing the traditional rationales of contract and property. However, with the shift in forms from contract to property, a shift in rationale occurred: While risk distribution is the economic heart of these novel instruments, the speculation of financial markets comes with it naturally. This brings the shipping industry closer to the disciplines of the financial market, which instigates further regulation.

An epilogue by *Hans Micklitz* positions the present volume, which is limited to property, in the broader context of modern regulatory private law and private law theory, highlights some critical questions, and gives guidance to further research.