

Book Review

The Intertwined Nature of Property and Regulation. A Book Review of Regulatory Property Rights: The Transforming Notion of Property in Transnational Business Regulation

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It has been said that property law is antiquated, based on old, sometimes obsolete, norms. The recent book *Regulatory Property Rights: The Transforming Notion of Property in Transnational Business Regulation*¹ moves beyond any antiquated notions of property to examine how property operates in a modern, highly regulatory (and regulated) society. The project, on its own terms, “aims to detect the function of modern property and the societal changes involved.”² To this extent, the book more than succeeds: it flourishes.

The book begins in an academic and quite civilian manner in Part I by classifying what it intends to discuss, namely regulatory property. Lest the reader think that “regulatory property” is novel or perhaps even an oxymoron, Christine Godt convincingly argues that regulatory property is actually “normal” property³—the term regulatory property identifies property’s role not only as giving individuals dominion over things, but also property’s role in coordinating and empowering individuals’ behavior. Human behavior, particularly that of businesses, knows no man- or state-made boundaries, thus Godt asserts that modern property law is about much more than one nation’s attempt to systematically assign uniform rights in a thing to a particular individual; modern property law is and must be more flexible than that. Under Godt’s conception of property, property law allows for different levels of regulation depending upon the thing and the sector in which the thing exists. For example, emission rights, succession rights, and financial instruments all create property rights, but those rights are quite different and transcend national boundaries. While that observation may not be particularly novel, Godt’s primary contribution is to utilize such different property rights to identify broad, functional, descriptive principles of modern

1 *Regulatory Property Rights: The Transforming Notion of Property in Transnational Business Regulation* (Brill Nijhoff 2017).

2 *ibid* 1.

3 *ibid* 40.

property. The principles Godt sets forth are (1) decision-making, (2) responsiveness, (3) universality, (4) transparency, and (5) transferability. Godt's conception of property, then, is broader than traditional civilian ideas of property which center around the particular rights of *usus*, *fructus*, and *abusus* in a thing, or the traditional common law concept of property being defined by many scholars as the right to exclude others. In developing a broad description of property, Godt's chapter ambitiously sets forth the tone of the book, namely that property is about more than assigning complete control over things; property is about assigning the right to make decisions with regards to things and the amount of decision-making rights that are assigned can be different depending on the types of things at issue.

Magherita Colangelo continues the book's opening by describing regulatory property as the creation of property rights in order to satisfy particular public policy goals. Because the property rights Colangelo is focused on attempt to remedy a public problem, the rights inherently deal with a scarce resource, be it a naturally or artificially created resource, and thus the rights are always valuable. Colangelo uses examples such as emission standards and airport slots to not only exemplify the types of regulatory property the entire book is focused on, but also to point out, as Godt also did, how regulatory property frequently transcends national boundaries. Under Colangelo's conception, regulatory property is more novel than Godt's description implies. For both scholars, though, the property issues they are focused on are comprised of a complicated, individualized web of regulation that seeks to influence how individuals, business, and markets conduct themselves.

After describing the type of property the book is focused on, *Regulatory Property Rights* moves to the more concrete issue of regulatory property within state-made borders. As Colangelo in particular notes in her chapter, regulatory property does not always sit squarely within one level of government regulation; it typically straddles multiple boundaries. That theme is picked up in Part II of the book through exploration of conflicts rules, insolvency proceedings, and governance rules for titles in land.

Sjef van Erp begins the discussion in Part II by questioning the traditional conflicts rule for property law, *lex rei sitae*. Van Erp draws excellent comparisons between applications of *lex rei sitae* in the European Union and the United States. He begins with traditional, relatively non-controversial applications of the conflicts rule, such as the use of *lex rei sitae* as the default rule for governing immovable property, and then skillfully builds on his analysis to add more layers of difficulty (and therefore controversy) in applying the conflicts rule. Matrimonial property, successions rights, and conveyances involving notaries all cause van Erp and the reader to question whether *lex rei sitae* is really still the best rule that can be developed by modern society. Van Erp convincingly asserts that the

digital revolution only further complicates this question because in the digital world it is no longer as clear where transactions or property occur or where property is located, facts which are central to the *lex rei sitae* analysis. While van Erp acknowledges there are local interests that help perpetuate the *le rei sitae* rule, he thoughtfully raises the question as to whether the time has come to reconsider the rule.

Jean-Michel Jude explores regulatory property in the context of insolvency, specifically focusing on the reform of insolvency regulations in May 2015 by Reg. 2015/848/EU. Jude establishes that approximately 25 percent of all insolvency proceedings in the European Union involve cross-border proceedings and those proceedings prior to May 2015 did little to help rescue bankrupt businesses by restructuring debt. The new regulation seeks to increase efficiency and effectiveness for cross-border insolvency proceedings. To do this, the new regulation limits debtors' ability to forum shop by more clearly identifying in which Member State the main insolvency proceeding must be opened. It also improves the connection between the main proceeding and secondary proceedings. Upon the opening of the main proceeding, rights *in rem* no longer apply to property situated outside of the Member State of the main proceeding; thus property is not fragmented off in secondary proceedings to the detriment of the main proceeding. Because all property of the debtor is brought into the main proceeding, Jude hypothesizes that creditors' rights will improve as creditors in different States will receive more information regarding the insolvency proceedings and that information will be more uniform from creditor to creditor. Furthermore, the new regulation facilitates more cooperation between companies involved in the multiple insolvency proceedings, as well as more cooperation between practitioners and courts. The new regulation, from Jude's perspective, appears to be a success story for regulatory property. While bankruptcy proceedings can be highly nationalistic, the new regulation takes to heart the notion that some property rights must be regulated by multiple States and that regulation must be carefully coordinated.

Leon Verstappen continues the discussion about careful coordination between different States by discussing the very location-driven subject of land tenure. Verstappen's focus is on The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security ("Voluntary Guidelines") which was endorsed by the Committee on World Food Security in 2012. In looking at the Voluntary Guidelines, Verstappen highlights how the Voluntary Guidelines suggest that States improve the protections of land tenure. While the Voluntary Guidelines have a number of recommendations, the thrust of them is to encourage States to honor all "legitimate tenure rights," be those rights public, private, communal, customary, indigenous, or even informal. Verstappen, though acknowledging that the Voluntary Guidelines

are just that—voluntary, takes an optimistic tone at even the mere creation of them as they were created from the bottom up; stakeholders of all types and of all nations were involved in the drafting of the Voluntary Guidelines. Verstappen's hopeful view is slightly dampened as he notes that the Voluntary Guidelines do not include rights in water and other natural resources. Be that as it may, Verstappen's spirits remain refreshingly buoyed by the Voluntary Guidelines desire to help States better regulate and protect land tenure.

While Part III of the book is titled "The Paradigm of Individuality," this section in substance focuses on the commodification and regulation of a particular type of property: natural resources. The first contribution by Alison Clarke and Rosalind Malcolm examines water as a form of regulatory property. Clarke and Malcolm take issue with the norm that water is a commodity and that property law has little to do with water given that absolute exclusionary rights are not traditionally held in water. Instead, Clarke and Malcolm view water as a part of a "common treasury," meaning a resource that should be usable by all.⁴ The authors support this Progressive Property-esque view with scientific evidence regarding the need for water, not only by individuals, but also by the ecosystem more broadly. Clarke and Malcolm highlight how private property rights in water have been granted in some jurisdictions, such as in England and Wales. Staying true to the theme of the book, Clarke and Malcolm quickly and correctly identify that any form of private ownership in water must be heavily regulated to insure that water is truly available as a community resource. In doing so, Clarke and Malcolm do an excellent job in showing how the physical interconnectedness of water, combined with society's need for water, can be coupled with a broader conception of property law to insure that resources are available for all.

Hanri Mostert and Cheri-Leigh Young expand on the preceding chapter by considering difficulties with traditional notions of ownership as they apply to natural resources, such as land, minerals, and water. On the whole, the book does an excellent job of having broad, comparative appeal across Europe. Mostert and Young expand the reach of the book by looking beyond European boundaries to South Africa. Mostert and Young begin by rejecting the view that natural resources can be only publicly owned or privately owned under the traditional concepts of ownership. The authors use water access, mineral rights, and land redistribution as examples of how these traditional forms of ownership have failed. For example, following the Apartheid, South Africa's Constitution established that access to water was a constitutionally-protected

⁴ *ibid* 123.

right.⁵ That right made the State the public trustee for water access, a role in which Mostert and Young assert the State has thus far had little success because of the State's inability to administer a complex water system free of corruption. Similarly Mostert and Young argue that the State has failed in being a good custodian of the country's ample mineral resources because the State has not adequately fostered investment into the industry or fought historic inequalities in the industry. Finally the authors explore South African land reform, noting again that the State has been less successful than it would like in correcting unjust land holdings in such a way as to encourage development. Based on these experiences, Mostert and Young argue that traditional notions of public and private ownership are not ideal in letting the State be a steward of the country's vast natural resources. Instead, a better regulatory system must be promoted that fosters capacity building and transparency.

Colin Reid closes out the third part of the book with a thoughtful piece on how property rights may enhance nature conservation. Reid acknowledges that property law, and really private ownership, can be an obstacle to conservation because private owners' individual interests do not necessarily correspond with the goal of conservation. Reid argues, though, that traditional property doctrines like tenancies, nuisance law, and the Public Trust Doctrine, can be useful for conservation efforts. He successfully details ways in which such traditional doctrines might benefit conservation efforts, such as by creating a payment system for ecoservices, conservation easements, and having biodiversity offsets. Reid's central point, then, is that property law fails conservation efforts when property law is left to an open, unregulated market. That failure does not inherently mean that property law lacks building blocks to aid conservation. The answer for Reid lies in determining what aspects of traditional property law could be used in a regulated manner for the benefit of nature conservation.

The final part of the book uses current examples of regulatory property to highlight how commodification and financialization operate in modern society. Rüdiger Wilhelmi begins this part by discussing commodification and financialization in the energy sector, specifically with regards to trading in energy contracts and emission allowances. For energy contracts, Wilhelmi tells the story of the German Energy Act from its original passage in 1935 to its revision in 1998 and since amendments. The original German Energy Act, though providing for State supervision, led to regional vertical monopolies that controlled production, transmission, and distribution. By the 1990s there was a move to disintegrate these

⁵ Article 27(1)(2) of the South African Constitution provides that "Everyone has the right to have access to ... sufficient food and water."

monopolies. Over the next two decades, German law slowly provided for open access to transmission lines and broke up the vertical monopolies by establishing independent system operators and independent transmission operators. For Wilhelmi, the German transition to an open, regulated market for energy contracts highlights how property rights that are commodified and financialized can improve supply and demand while decreasing market abuse. Wilhelmi also discusses how emission rights have been commodified and financialized, though the success story for emission rights is less clear. Some of the market failure for emission rights, Wilhelmi states, is caused by the State creating too many certificates, i.e. creating an over supply, which leads to a decreased demand, which for emission rights means the failure to cut back on pollutants at the rapid rate the State might like. That said, Wilhelmi remains optimistically cautious that by utilizing capital market law to regulate emission rights and energy contracts, some (and perhaps many) of the problems in these areas can be remedied.

Christine Godt and Jonas Simon continue the discussion in Part IV by bringing back a theme from Godt's earlier contribution: regulatory property requires that different rights correspond with different things; one-size fits all does not work. Godt and Simon apply the conception of regulatory property used throughout the book to licenses during insolvency proceedings for the licensor. To do so, the authors first compare how licenses are treated in insolvency proceedings in the Netherlands, Japan, the United States, and Germany. In the United States and Japan, licenses are protected by statute during a licensor's bankruptcy, thereby giving an *in rem* effect to licenses.⁶ Dutch and German law has moved to be closer to U.S. and Japanese law in this regard, though the licenses rights in those jurisdictions remains less codified. While there is some movement towards unification for license rights in insolvency, there is far less unification on rights of sub-licenses in the same position. For Godt and Simon, these differences highlight how regulatory property is able to distinguish between different forms of property—licenses and sublicenses—and in a situation like insolvency, foster a dynamic, efficient allocation of limited resources.

Viola Heutger finishes the substantive contributions of the book by discussing derivatives in the freight-shipping market. Derivatives, as Heutger notes, are an important part of the modern shipping industry because they allow for traders to hedge against risks (which are plentiful in the maritime world, as Heutger describes). Derivatives, however, were not always part of the maritime market. Heutger provides a history of maritime financing over the past thirty years. As she notes, the recent financial crisis sped up the market's creation of new financial

⁶ see 11 U.S.C. § 365; Art. 56 sec. 1 Japanese Bankruptcy Code.

instruments such as derivatives. With the increased use of such financial instruments also came an increase in multi-lateral regulation, something Heutger argues should likely increase given that the maritime market is becoming only more complex and the players in that market more numerous. Heutger ends by implying a word of caution: the constantly changing and growing market is why increased regulation is needed, but that increased regulation must keep up with the constantly changing and growing market.

This cautious instruction raised by Heutger is a question worthy of posing to all of the authors: If property and regulation are permanently intertwined (which the authors convincingly argue they are), how can the law be best constructed so as to keep up with a constantly advancing world? Emission rights, mining practices, water usages, and debt instruments are but some of the examples used in the book of regulatory property. All of these forms of property are constantly evolving due to both scientific and market advancements. What tomorrow holds for these properties remains unknown. If the law is to help regulate these properties so they may, as Godt says at the outset, coordinate and empower human behavior, the law must keep up. Many examples in the book highlight how State actors have frequently failed to keep up. Query: what are best practices for States to keep their regulatory systems at least on par with the constantly changing world?

While that question may be unanswerable, the book does an excellent job at answering many questions. The book more than succeeds in highlighting how modern property rights do not fit neatly within traditional property doctrines. The Blackstonian view of property as having dominion over a thing is not easy to apply to complex properties today such as water access rights in South Africa or debt-restructuring proceedings in the European Union. Many chapters in the book do a very good job at drawing comparisons between nations, particularly members of the European Union and, to a lesser extent, the United States. That type of comparison is necessary particularly given the realization by all of the authors that property in the modern world transcends national boundaries.

While more of the chapters of the book could directly speak to one another (there are fewer direct references between the chapters than one might expect in such a thematic book), the theme of regulatory property runs like a river through the book, saturating (in a good way) all of the author's work. Anyone who picks up the book uncertain of whether property can remain a stagnant doctrine based on thoughts and customs from Justinian's era or 1066 AD will end the book convinced that property and regulation are inextricable in the modern world.

A healthy portion of the book's rationale that property and regulation are inextricable is the fact that property rights today are more multi-State than property rights were in the first part of the twentieth century. The factual descrip-

tions the book provides of how property rights cross man-made borders are a great reminder in today's political climate that multi-State regulation and interaction is not a luxury but a necessity. There is unquestionably a growing disdain for regulation, particularly in the United States, and a growing desire for inward-looking nationalistic policies across the developed world. Leaders in all countries must realize that globalization has come and is not leaving. This is true even at such a fundamental private law level as property law. The impacts of Blackacre are no longer limited to only the jurisdiction where Blackacre sits; the impacts can be worldwide. The highlight of the book, then, is in its description of how modern property of a variety of types is no longer limited to an existence in only one State; property rights are global. Because of the global nature of property rights today, complex, multi-State regulation of property rights is necessary. On this front, the book is incredibly successful.