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“The Roman origins of the European legal property right systems”

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« *Thou shalt not steal* », *Exodus*, 20, 15.

The penalty for stealing others' property historically led to the consecration of individual ownership¹. The word “property” comes from *proprius* which means own, without sharing. The owner is therefore the one who has the right to benefit from the good while keeping others away. However, the study of history and comparative law highlights that the concept of ownership includes different meanings, from the overlapping of property rights on a similar good to a unitary ownership concept. Indeed, if the owner is the one who owns the right to exclude others, this exclusiveness can sometimes only deal with some utility of the good. Several property rights then apply to only one thing.

Even if private ownership was already known before Roman law, Justinian’s compilations introduced a unified approach of ownership. According to the *Institutes*, the Roman *dominium* is a “*full power in the thing*”². The *dominium*, clearly distinct from real rights on others' property, refers to an exclusive control over the whole thing that allows the owner to keep others away³. It involves a complete control: the owner can use his belongings, dispose of them freely or against payment, and even abandon or destroy them⁴. It is a perpetual right, except where the prolonged possession of the thing allows the possessor to become the owner. Ownership usually implies only one holder: co-ownership as well as division of ownership are temporary. Ownership is made to resume its full extent one day⁵.

Roman law was rediscovered on the European continent, starting from Italy at the end of the 11th century⁶. It strongly influenced the European property law⁷, even if it had been partly

¹ J-L. Halpérin, *Histoire du droit des biens*, Economica, 2008, pp. 3-4.

² “*Plenam habere in rem potestas* », *Institutes de Justinien*, II, 4, 4.

³ A-M. Patault, *Introduction historique au droit des biens*, PUF, 1989, p. 85.

⁴ However, this absolute right was already limited to a certain extent, in the interest of the neighbourhood or of the public. See on this point P.F. Girard, *Manuel élémentaire de droit romain*, Dalloz, Réédition de la 8^e édition de 1929, 2003, pp. 277-280.

⁵ J-Ph. Lévy et A. Castaldo, *Histoire du droit civil*, Dalloz, 2002, n°239 p. 316. R. Robaye, *Le droit romain*, 3e édition, Bruylant, 2006, p. 124.

⁶ J. Bart, *Histoire du droit privé de la chute de l'Empire romain au XIXe siècle*, 2^e édition, Montchrestien, 2009, p. 116.

⁷ J. Gaudemet, *Droit privé romain*, Montchrestien, 1998, p. 215.

misrepresented by glossators during the 12th and 13th centuries. Nevertheless, England remained unaffected by this influence due to its organizational insular traditions and the importance of the Courts of Westminster. *“The need to comply with the strict procedural frameworks was a major barrier to the spreading of Roman law concepts”*⁸. The English property law therefore developed autonomously.

Henceforth, two legal systems co-exist in Europe: Romano-Germanic law (also called Civil Law), based on Roman law, and Common Law, made up with judge-made standards, for special cases. It seems to be possible to talk about the roman origins of property right in the first case only. Despite a few cases of collaboration, these two legal property right systems remained separated.

The Roman heritage thus varies greatly in Europe (I). A unification of the European legal property right systems can hardly be envisioned (II).

I/ A Roman legacy with a variable geometry in Europe

While Roman law is the direct source of the Romano-Germanic property law (A), the English property law differs considerably (B).

A/ A Romano-Germanic property system directly based on Roman law

Rediscovering Roman law on the European continent yielded to the end of the feudal system, which was characterized by divided property, and enshrined exclusive and unitary ownership.

Nowadays, the French and German property laws both stress the impact of absolutism and exclusivism of property right. Under article 544 of the French civil code, it is *“the right to enjoy and possess in the most absolute manner.”* The Declaration of the Rights of Man and of the Citizen of 1789, that is part of the French constitutional bloc, refers to property right as an *“inalienable and sacred right”* of which *“no one can be deprived”*. Similarly, the article n°903, paragraph 1, of the German Civil Code stipulates *that “the owner (...) can dispose of his good as he sees fit, free from interference by others”*⁹.

⁸ R. David, C. Jauffret-Spinozi et M. Goré, *Les grands systèmes du droit contemporain*, 12^e éd., Dalloz, 2016, n°268 p. 256.

⁹ M. Fromont, *Droit allemand des affaires*, Montchrestien, Collection Domat droit privé, 2001, p. 147.

Property right is, like the Roman *dominium*, characterized by the power to exclude others from any rights over the thing. If a third party possesses one of his goods, the owner can get it back by submitting a property claim¹⁰. He may also require the destruction of any construction built by somebody else on his own land. Under the French law, the punishment is particularly harsh: destruction is a right whatever the size of the encroachment¹¹. Furthermore, the action is not subject to a time limit¹² and to abuse of rights¹³. The solution adopted by the German law is more flexible: in case of good faith from the builder or absence of immediate protest by the neighboring owner, the owner will only potentially obtain a payment of the rent or be compensated of the value of the land¹⁴. In Civil Law, the owner can thus assert his rights towards others (*erga omnes*). He is even protected against public authorities. No one shall be deprived of his property, except upon payment of just compensation for reasons of public utility¹⁵.

Disposing fully of the good, the owner has, in principle, the right to do anything with it, just like in Roman law. He can use it himself (because he has *the usus* of it), enjoy the fruits it produces (thanks to the *fructus*) and even destroy it (thanks to the *abusus*). The owner can allow somebody else to dispose of some of its utilities by subjecting his good to rights in rem. For instance, the usufruct allows somebody else to use the thing and enjoy the benefits it engenders (the *usus* and *fructus* are temporarily transmitted to someone else.) Such “shared ownership” is always temporary. Indeed, according to Civil Law, the ownership principle is based on a unitary property right over the thing. On the contrary, Common Law, which drew very little from Roman law, is characterized by a divided property.

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¹⁰ § 985 of the German Civil Code (BGB).

¹¹ Civ. 3^e, 20 mars 2002, n° 00-16015: wall encroaching of 0,5 cm on the neighbouring lot.

¹² Civ. 3^e, 30 juin 2010, n° 09-16257.

¹³ Civ. 3^e, 7 juin 1990, n° 88-16277.

¹⁴ § 912-916 of the German Civil Code (BGB).

¹⁵ In Germany, the principle was enshrined in section 14 of the German Basic Law. For France, it is affirmed by section 17 of the Declaration of the Rights of Man and of Citizens of 1789 (“Property being an inviolable and sacred right, no one can be deprived of private usage, if it is not when the public necessity, legally noted, evidently requires it, and under the condition of a just and prior indemnity”) and reproduced in article 545 of the Civil Code (“No one may be compelled to yield his ownership, unless for public purposes and for a fair and previous indemnity”)

B/ A Common Law property system not inspired by Roman law

While property law was substantially influenced by Roman law in continental Europe, England has remained pegged to its property system in matter of buildings, which was inherited from its feudal history. No break-up has occurred and the general structure of property law has not been fundamentally altered. The characteristics of land ownership in England still consist of a fragmentation into pieces of several property rights over a single land.

The source of this particular conception is found in medieval tenures, under which a single land supported multiple rights. Each tenant owned his tenure or fief against adequate services. This fragmented analysis of ownership opened up the way to the *estates* doctrine, which is the foundation of the modern property law.

Far from an absolutist and unitary view of ownership, English law recognizes a set of rights and privileges for each estate-holder or interest-holder. Land rights over a single thing to the benefit of several people overlap each other.

Whether they are perpetual or restricted, future or present, these land rights are effective and present elements of the holders' inheritances¹⁶. "*The estates and propriety theory is based on a puzzle-like model: each estate, each interest is part of a puzzle*"¹⁷. Each right is linked to the foregoing ones: at every level, the thing is held from the previous person, who has retained over it a form of control¹⁸. The English property system may then be described as "*linear*", whereas the Romano-Germanic one is "*collateral or allodial*"¹⁹.

The different sources of Civil Law and Common Law make any future unification of the issue impossible. The conceptions of property right applied in both European legal systems are indeed very different from one another.

¹⁶ M-F. Papandréou-Deterville, *Le droit anglais des biens*, LGDJ, 2004, n°192-193 pp. 130-131.

¹⁷ E. Bouchet-Le Mappian, *Propriété intellectuelle et droit de propriété. Droit comparé anglais, allemand et français*, *PUR*, 2013, n°486, p. 261.

¹⁸ M-F. Papandréou-Deterville, *op. cit.*, n°61 p. 49.

¹⁹ C. R. Noyes, *The Institution of Property – A Study of the Sevelopment, Substance and Arrangement of the System of Property in Modern Anglo-American Law*, Longmans, Green & Co. 1936, pp. 514-515.

II/ An impossible unification of the European legal property right systems

Even if there have been some connections between Civil Law and Common Law, these are only temporary issues (A) and do not allow to foresee a real European harmonization in the future (B).

A/ One-off cases

The concept of exclusive and unique ownership of something is not totally unknown in Common Law. (1) In parallel to this, some resurgence in spread out ownership can be noticed in Civil Law (2).

1. The existence of exclusive ownership in Common Law: the personal property

The English property law allows two types of property rights to coexist: real property and personal property. If real property can be characterized by its fragmentation of several rights to the same parcel of land, personal property is, on the contrary, a single and complete property right²⁰. It is closer to the continental conception of ownership. “*Single and indivisible*”, personal property directly relates to movable property without the intermediary of the *estate* and allows the owner of the movable to use it, to enjoy it and to dispose of it.

²⁰ M-F. Papandréou-Deterville, *op. cit.*, n°244 et s.

2. The resurgence of a « fragmented »²¹ property right in Civil Law

The absolutist and unique conception of ownership has recently been questioned within the Romano-Germanic system which is experiencing socialisation of property right as the rights of the owner are getting increasingly controlled for the common good. In France, Louis Josserand focused on the “*social impossibility of absolute property right*”²². The social dimension of property right has mainly been developed by Léon Duguit, who redefined property right as a “*social function*”²³. According to him, the principle of social interdependency reminds the owner of his obligations towards society. “*The owner has the duty and hence the power to use his property to the satisfaction of common needs, the needs of an entire national community or of secondary communities*”²⁴. Any action going against this “*social function*” shall be punished. Such conception of property right in Article 14, paragraph 2 of the German Basic Law is clearly defined as follows: “*Ownership implies obligations. Its use shall contribute to the common good*”. By consecrating the objective of constitutional value, according to which each person shall have the possibility to get decent accommodation, the French Constitutional Council also seems inclined towards such social conception of property right²⁵. The owner would have obligations towards society and may not be able to decide to leave his properties behind when others could need them. The creation of a special tax on vacant accommodation²⁶ and of requisition orders is an illustration of it. Keeping premises vacant at a time of housing crisis could be considered as contrary to common good policy.

²¹ M-H. Renaut, *Histoire du droit de propriété*, Ellipses, 2004, p. 102 : « éclaté ».

²² L. Josserand, *De l'esprit des droits et de leur relativité. Théorie dite de l'abus des droits*, Dalloz, 1927, p. 14.

²³ L. Duguit, *Les transformations générales du droit privé depuis le code Napoléon*, 2^e édition, Alcan, 1920, La mémoire du droit Réimpression 1999, p. 21

²⁴ *Op. cit.* p. 165-166.

²⁵ H. Pauliat, *L'objectif constitutionnel de droit à un logement décent : vers le constat de décès du droit de propriété ?*, D. 1995, p. 283 : “*The right to decent housing confirms a recognition of the social function of property right*”. M. Laborde-Coste, *La propriété immobilière est-elle une “fonction sociale” ?* in *Mélanges J. Brethe de la Gressaye*, Ed. Bière 1967, p. 373. J-F. Lachaume et H. Pauliat, *Le droit de propriété est-il encore un droit fondamental ?*, in *Mélanges P. Ardant. Droit et politique à la croisée des cultures*, LGDJ 1999, p. 388. H. et L. Mazeaud, J. Mazeaud et F. Chabas, *Leçons de droit civil, T. 2, Les biens*, Montchrestien 1994, n°1303 : “*The increasing number of limitations added to property right turn it into « a social function ; the owner is bound to exercise his rights to the benefit of all or at least, he can't act against general interest »* V. Godfrin, *Le droit au logement, un exemple de l'influence des droits fondamentaux sur le droit de propriété*, in *Ethique, droit et dignité de la personne. Mélanges Christian Bolze*, Economica 1999, p. 137.

²⁶ A tax on vacancies therefore exists in France in the towns with more than 50 000 inhabitants, when there is lack of balance between housing supply and demand.

Some authors claim that we would then “witness a return to multifaceted ownership such as defined in the pre-Revolutionary law,” as ownership would no longer be a “right encompassing all uses made of the thing” in order to meet the needs of the community²⁷. Therefore, in commercial leasing matters, the French law of 30th June 1926 provides the tenants the right to renew the lease. The owner can no longer take back his property after the end of a commercial lease as he has to pay a substantial indemnity made to compensate the tenant for the loss suffered if he refuses to renew the lease. “There may exist two kinds of property rights over a single thing: civilian property right and commercial property right”²⁸. Likewise- and still in France, the status of tenant farming in the agricultural sector acknowledges the right of every farmer to renew the lease²⁹ and provides notably pre-emptive rights³⁰. In those circumstances, it can be claimed, “the farmer became again the utility owner, as in the pre-Revolutionary law, and has direct control over the thing owned, no longer defined by the contract but by law”³¹.

However, these recent developments of property right in the Romano-Germanic system do not challenge the underlying differences between the Civil Law and the Common Law conceptions of ownership.

B/ The huge contrast between the different conceptions of ownership

The reality is that the boundaries placed on the owner’s prerogatives in the Romano-Germanic system do not undermine the conception of property right as an absolute and exclusive control of the person on the property. And whether the owner’s prerogatives are temporarily or even drastically reduced does not really matter. These limitations “restrict property right without altering or distorting it since, by definition, property right is a variable-geometry right. The defining feature of it is not its scope but the scope it may have”³².

²⁷ M-H. Renaut, *Histoire du droit de propriété*, op. cit., p. 107.

²⁸ M-H. Renaut, *Histoire du droit privé. Personnes et biens*, Ellipses, 2008, p. 160.

²⁹ Code rural, articles L. 411-46 et s.

³⁰ Code rural, articles L. 412-1 et s.

³¹ M-H. Renaut, *Histoire du droit privé...*, op. cit., p. 161.

³² M. De Vareilles-Sommières, « La définition et la notion juridique de la propriété », *RTD civ.* 1905, p. 467.

In Civil Law, property right is a framework whose content has not been precisely defined³³; it is an open space of freedom³⁴ that enables the owner to use his ownings for any non-prohibited purposes³⁵. Therefore, its nature is quite different from real rights on somebody else's ownings whose content has been precisely defined. "*Real rights are concrete and restricted whereas property right is, in general abstract and potential*"³⁶. What is essential in property right is not so much the utilities that it provides but rather the fact that it virtually allows all of them³⁷. Just like in Rome, property right is supposed to fully recover control over the thing owned one day; any limitations or real rights being necessarily time-limited³⁸.

On the contrary, according to the Common Law, property right is not distinguished from real rights on somebody else's ownings. *Propriety interests* are not intended to alter and the *estates* are not intended to gather together to reconstitute a full-right. Fragmentation is the normal status of land ownership³⁹. Contrary to real rights as understood in Civil Law, the *estates* are not thought of as fragmented components of a whole system, intended to be put back together one day. The analysis of personal property is not either based on a unique and absolute conception, but rather on a fragmented vision. Even if the different components of personal property are often gathered together in the hands of only one person, its concept is conceived as a patchwork of rights over the thing owned. It cannot therefore be treated as an absolute and unique ownership as defined in Civil Law. Indeed, "*personal property is also part of the linear and derivative system which is more inclined to rely on several components of a set considered as eminently divisible rather than on a supposedly indivisible whole*"⁴⁰.

³³ F. Zenati, « Pour une rénovation de la théorie de la propriété », *RTD civ.* 1993, p 315. F. Zenati, *Essai sur la nature juridique de la propriété. Contribution à l'étude du droit subjectif*, Thèse Lyon III, 1981, n°67 p. 107. Ch. Aubry et Ch. Rau, *Cours de droit civil français d'après la méthode de Zacharie*, Tome 2, par E. Bartin, 6^e édition, Librairie Marchal et Billard, 1935, § 190 p 248.

³⁴ R. Libchaber, « La recodification du droit des biens », in : *Le Code civil. 1804-2004. Livre du bicentenaire*, Dalloz Litec, 2004, n°8 p 307.

³⁵ Section 903 of the German Civil Code, just as the Declaration of 1789 and section 544 of the French Civil Code actually provides for the possibility of restraining the owner's prerogatives

³⁶ E. Bouchet-Le Mappian, *op. cit.*, n°517, p. 274.

³⁷ S. Ginossar, *Droits réels, propriété et créance. Elaboration d'un système rationnel des droits patrimoniaux*, LGDJ, 1960, p 32.

³⁸ R. Robaye, *Une histoire du droit civil*, 3^e édition, Bruylant, 2004, p. 102.

³⁹ E. Bouchet-Le Mappian, *op. cit.*, n°486, p. 261

⁴⁰ M-F. Papandréou-Deterville, *Le droit anglais des biens*, LGDJ, 2004, n°249 pp. 161-162.

Conclusion

One can therefore conclude that the structures on which the Civil Law and the Common Law property systems are based are irreconcilably different. *“The different history of both these legal systems has led to (...) a particular way to gather some rules and to develop concepts that differ widely on the European Continent and in England. Civil Law concepts have been primarily developed in universities and were formulated on the basis of Roman law. Common Law concepts are mainly derived from earlier forms of procedural requirements and remain reflective of medieval thought patterns”*⁴¹.

⁴¹ R. David, C. Jauffret-Spinozi et M. Goré, *Les grands systèmes de droit contemporain*, 12^e édition, Dalloz, 2016, n°303 p. 284.