

Cambridge University Press

978-1-107-12192-8 - Protection of Immovables in European Legal Systems

Edited by Sonia Martín Santisteban and Peter Sparkes

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Protection of Immovables in European Legal Systems

How should a landowner respond when a squatter occupies their land? This book discusses the issues focusing on *vindicatio*, possessory remedies and trespass, but also explores administrative procedures for their removal. In many cases, these actions derive from Roman law, which are expertly explored in an introductory chapter. Also included is a chapter exploring human rights interventions in such actions. Twelve case studies offer an extensive and comparative analysis across fourteen European jurisdictions. The basic defendants covered are squatters taking over a home, environmental protesters, licensees and former tenants. The case studies include, amongst others, self-help; restitution; competing claims to ownership (and the relevance of registration systems to claims to ownership); adverse possession; neighbours; nuisance and encroachment.

SONIA MARTÍN SANTISTEBAN teaches Spanish civil law at the University of Cantabria and serves as a substitute judge at the Cantabria Courts of Appeals. She is member of the Court on Trusts and Fiduciary Relationships from the Republic of San Marino.

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The Common Core of European Private Law

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For the transnational lawyer the present European situation is equivalent to that of a traveller compelled to cross legal Europe using a number of different local maps. To assist lawyers in the journey beyond their own locality *The Common Core of European Private Law Project* was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union member states. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.

A list of books in the series can be found at the end of this volume.

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Foreword

It gives me deep satisfaction to write this short introduction to this volume in the Common Core of European Private Law series. On top of serving as a General Editor for the past twenty years, I have always participated in the property sections, first with Antonio Gambaro and now with Anna di Robilant as Chairs. Since the very beginning of our conversations, it has been clear that property law produces very serious challenges for the common core methodology and that any functional method requires quite a serious tune up in order to cope with the deep structural differences among the legal traditions. Fifteen years ago, I experienced directly these kinds of difficulties, already pointed out by John Merryman, when I published my *Basic Principles of Property Law: A Comparative Legal and Economic Introduction*, a work in which I approached core areas of property law to develop ‘bottom-up’ principles taken from five legal systems. My purpose was of comparing them from a rudimentary efficiency perspective. Because of that experience, I am particularly impressed by the volume of Martín Santisteban and Sparkes that has tackled fourteen legal systems thoroughly with a sophisticated common core methodology that has never been attempted before in a core area of property law.

Indeed, this is basic legal research at its best. To begin with, it is a collective effort carried on for many years first at the University of Trento and later at the International University College of Turin. It is impossible for a solo scholar to do this kind of work that requires deep basic knowledge of a large number of systems that deploy different languages and deposit their property law into quite different formal and substantial sources. Moreover, immovable property is a domain in which common core research serves no practical purpose, given the fundamental jurisdictional principle of the *forum rei sitae* and the intimately local nature of immovable property law. In this domain, comparative research can develop outside of

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any practical agenda serving its fundamental purpose of seeking theoretical knowledge. There are not many areas where legal scholarship can enjoy such a luxury. In these areas, the practical purpose of jurisprudence yields at its deeper function of understanding the way in which human communities independently organise themselves, exercising their sovereignty over the fundamental issue of distribution of resources. In these domains of basic research, comparative jurisprudence reaches genuine knowledge on the way in which law reflects deeper social and political values. This is the domain of historical research, interestingly deployed in this study, which allows the best understanding of how law has adapted in different contexts to variable circumstances. In these contexts, where property law is an intimately local device, any attempt to impose a normative vision other than that stemming from the shared social practices is arrogant and arbitrary. Unfortunately, the recent rights discourse of the European Court of Human Rights, perhaps covered too favourably, displays this attitude in its relentless imposition of neo-liberal values, demonstrating the dangers of the functional approach when deployed in pursuit of an ideological agenda.

Ugo Mattei, University of Turin and University of California,
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General Editors' preface

This is the 15th book in the series *The Common Core of European Private Law* published within *Cambridge Studies in International and Comparative Law*. The Project was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The methodology used in the Common Core project is novel. By making use of case studies it goes beyond mere description to detailed inquiry into how most European Union legal systems resolve specific legal questions in practice, and to thorough comparison between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own national legal systems. The collection of materials that the Common Core Project is offering to the scholarly community is already quite extensive and will become even more so when more volumes are published. The availability of materials attempting a genuine analysis of how things are is, in our opinion, a prerequisite for an intelligent and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified. The analytical work carried on today by the almost 200 scholars involved in the Common Core Project is also a precious asset of knowledge and legitimisation for any such normative enterprise.

We must thank the editors and contributors to these first published results. With a sense of deep gratitude we also wish to recall our late Honorary Editor, Professor Rudolf B. Schlesinger. We are sad that we have not been able to present him with the results of a project in which he believed so firmly.

No scholarly project can survive without committed sponsors. The International University College of Turin with the *Compagnia di San Paolo* and the *Consiglio Nazionale del Notariato* allow us to organise the General

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Meetings. The European Commission has partially sponsored some of our past general meetings, having included them in their High Level Conferences Program. The Italian Ministry of Scientific Research, The University of Turin, the University of Trieste, the Fromm Chair in International and Comparative Law at the University of California and the Hastings College of Law, and the Centro Studi di Diritto Compaarato of Trieste, have all contributed to the funding of this project. Last but not least, we must thank all those involved in our ongoing projects in contract law, property, tort and other areas whose results will be the subject of future published volumes.

Our home page on the Internet is at www.common-core.org. There you can follow our progress in mapping the common core of European private law.

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Mauro Bussani, University of Trieste and University of Macau,
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Preface

This project was launched at the 14th Common Core meeting which took place in Turin in July 2008. During the Property session led by Professor Gambaro, Ugo Mattei pointed out the suitability of a factual approach to the remedies available for the protection of property. At that time I was a respondent for the Spanish report on the Transfer of Immovable Property and I dared to accept the challenge of being the editor for this new topic. I made contact with my co-editor, Professor Peter Sparkes of Southampton University, via the Society of Legal Scholars. Together we presented a preliminary questionnaire which covered both immovables and chattels to the Property group at the 15th Common Core meeting (2009). After detailed discussion, the conclusion was reached that it was better to drop chattels from the questionnaire in order to make a manageable task; hence our topic, the Protection of Immovables. With an initial team of respondents collected together quickly, we were able to begin shaping the new questionnaire on immovables to take account of the main issues arising in litigation in the very different legal systems across Europe. By the time of the 16th Common Core meeting (2010) we were able to meet for the first time as a group with a respectable but limited number of reports on the table. Most of the problems we went through as editors are well known to the Common Core project: covering properly the field but not overlapping with other ongoing projects, being sufficiently technical within an overarching terminology, finding a logical order to representative questions and securing a common standard and quality to the structure of the national reports. We spent a considerable amount of time scouring Europe for reporters combining technical knowledge with the ability to communicate it simply in excellent English, but we hope that readers will agree that this was time well spent. We were fortunate to find reporters blessed with uncommon patience, who were willing to

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amend their work several times as the questionnaire was amended at an advanced stage. I want to underline the efficiency of Dr Sandra Passinhas and Professor Frits Brandsma who wrote their contributions within an extraordinarily short deadline and the remarkable work done by Helen Morse in editing our English and putting the text into the format required by Cambridge University Press. All the members of the group were saddened by the death of Helen Morse in March 2013, after her disinterested contribution to our project. This book is dedicated to her memory and to my son Bruno, who came into the world as the book was at its final stage.

The book is the result of a collective enterprise, performed by those who appear as authors but also by those who have helped the project to become a reality. Thank you to the members of the Property session who joined in and enriched our discussions in Turin. We wish to thank especially Professors Ugo Mattei and Mauro Bussani, General Editors of the Common Core project, and Professor Antonio Gambaro, chairman of the Property group, for trusting us with this project and for helping to improve our work. We are grateful to Antonio Marchisio for his help with our webpage, and to Emmanuela Amsler and the staff of the International University College of Turin for their organisational efforts in the Turin meetings. Like all involved in Common Core projects, we will carry with us memories of the legendary hospitality at Turin and the friendships forged during this work.

Sonia Martín Santisteban,
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Translations of many of these statutes are available on www.finlex.fi/en/laki/kaannokset

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13.02.1920/26

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10.9.1999/895

Marriage Act (*Avioliittolaki*), 13.06.1929/234

Police Act (*Poliisilaki*) (PA), 22.07.2011/872

Real Estate Formation Act (*Kiinteistönmuodostamislaki*) (REFA),
12.04.1995/554

FRANCE

There are two annual commercial editions of the Codes (Dalloz and Litec), and a consolidated version of all the codes and laws is available on <http://legifrance.gouv.fr>; there are a number of English translations

Civil Code (*Code Civil*) (CC)

Civil Procedure Code (*Code de Procédure Civile*) (CPC)

Condominiums Law (*Copropriété*), 10 July 1965

Law on the Organisation of the Judiciary (*Loi des 16–24 août 1790 sur l'Organisation Judiciaire*)

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Code of Civil Procedure (*Zivilprozessordnung*) (ZPO), as promulgated on 5 December 2005, Federal Law Gazette (*Bundesgesetzblatt*) I p. 3202; 2006 I p. 431; 2007 I p. 1781, last amended by art. 3 of the Act of 24 September 2009 *Bundesgesetzblatt* I p. 3145

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