Principles of European Law
Study Group on a European Civil Code

Acquisition and Loss of Ownership of Goods
(PEL Acq. Own.)

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5. **Limitations as to scope contained in VIII. – 1:101.** For the purpose of clarification, reference is to be made to VIII. – 1:101 (Scope of application) which, in paragraphs (4) and (5), contains limitations as to the kinds of assets covered by this Book: documents (paragraph (4)(a) of the named Article) and money (paragraph (5)), beeing corporeal movable assets, could otherwise be regarded as covered by this Book. See VIII. – 1:101 (Scope of application) Comments E36 and F.

Notes

Notes not applicable to this Article.

Article VIII. – 1:202: Ownership

"Ownership" is the most comprehensive right a person, the "owner", can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property.

Comments

A. General

1. **Function of the Article.** This Article defines the right of "ownership", this virtually being the most central term in the whole Book. The rule, therefore, defines what is transferred or otherwise acquired, and to what the means of protection provided by VIII. – 6:101 (Protection of ownership) relate. The definition is in fact used throughout the DCFR (see the list of definitions) but this is the obvious place to express it in the model rules. Adopting a definition in Book VIII is also important to make the effects of the subsequent Chapters understandable.

2. **Comparative background.** A definition like that in this Article is quite common in European legal systems following a Roman law tradition in matters of property law. The perception in these legal systems is that ownership is a right *in rem*, i.e. a right of a person directly related to an asset (as opposed to a right of a person directed against another person, who is under an obligation to perform), an absolute right, being effective against everyone *(erga omnes)*. The concept is, as such, not equally rooted in the common law tradition, where title is viewed as a relative, rather than an absolute, matter. As to the particular contents of the right, the common law concept is, however, not so remote from a civil law understanding, also associating "property" or "title" with the greatest possible interest in a thing, consisting of a "bundle" of various "incidents" or "aspects" which largely correspond with the ones listed in the present Article. None of the incidents is individually necessary, though, and individual incidents of property can be transferred

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from the bundle to other parties without the transferee becoming the "owner". There is also a common understanding in that such incidents re-vest in the owner once any lesser interests granted in respect of the thing terminate (sometimes described as the "flexibility" of ownership). With regard to Nordic legal systems, a concept of ownership comparable to the definition provided in the present Article is quite commonly used as a description outside situations of transfer or other acquisition. It is, however, not usual to deduce specific legal consequences from qualifying a person as "the owner". In particular, when it comes to a transfer of the right, e.g. under a contract for the sale of goods, Scandinavian legal systems treat all "aspects" of "ownership" separately and independently from one another, so that different points in time may be decisive for different aspects to "pass". This is sometimes called a "functional approach". The provisions of this Book, in general, do not follow such an approach although a functional analysis of the issues is employed and a few exceptions are recognised to the basically unitary approach adopted. See VIII. – 2:101 (Requirements for the transfer of ownership in general) Comments A4, C11-66 and G92-93.

B. The rule in detail

3. **Comprehensive and exclusive right over property.** "Ownership" is defined as the most comprehensive right a person, the "owner", can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property. The definition builds upon the idea of a legal relation between a person and a thing, the right provided by this legal relation being maximally comprehensive and of exclusive character. The exclusive character corresponds to specific means of protection provided by property law and by general rules of the law of obligations. For a detailed discussion of the "aspects" or "incidents" of ownership in the context of a transfer, see VIII. – 2:101 (Requirements for the transfer of ownership in general) Comments C21-63.

4. **Right to use, enjoy, modify and destroy.** The owner is entitled to deal with the property in any factual way. The owner may use it (e.g. drive a car) or simply have it without using it. The owner may decide whether to use it personally or make its use available to another (e.g., by letting the goods on lease). The owner is also allowed to affect the substance of the property, covering mere adaptations and modifications as well as destruction – e.g. painting a car, modifying an item of clothing, drinking wine.

5. **Right to dispose.** The owner is also entitled to dispose of the property. This covers the owner's power to transfer title of the goods to another and to create limited proprietary rights in the property. This incident, the owner's "right to transfer the ownership", is addressed as a general transfer requirement in VIII. – 2:101 (Requirements for the transfer of ownership in general) paragraph (1)(c). Also, the owner can, based on the comprehensive right to dispose, grant such a possibility to another person, in which case this Book speaks of the "authority" to dispose; cf. VIII. – 2:101 (Requirements for the transfer of ownership in general) Comments H99-101.

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6. **Right to recover, including separation in insolvency.** The owner has the right to recover possession of the property from any other person holding it without being entitled to do so. This is provided for by VIII. – 6:101 (Protection of ownership) paragraph (1). It is essential that this right is also effective as against the current holder's creditors in the latter's insolvency (right of separation) as well as against creditors of such other person who seek to enforce their claims in the property outside insolvency proceedings. If, therefore, in a transfer situation, the transferee has already acquired ownership of the goods while they are still in the hands of the transferor and the transferor becomes insolvent, the transferee has a right to separate the goods and is thereby protected as against the transferor's general creditors. Details are discussed in VIII. – 2:101 (Requirements for the transfer of ownership in general) Comments C21-51.

7. **Other means of protection.** In addition, the owner is entitled to property law protection where another person interferes with the owner's rights in any other way than by dispossession, or where such interference is imminent; see VIII. – 6:101 (Protection of ownership) paragraphs (2) and (3). Interferences with the owner's property may also trigger protection under the rules of Book VI on non-contractual liability for damage and under the provisions of Book VII on unjustified enrichment. A closer discussion is provided in VIII. – 2:101 (Requirements for the transfer of ownership in general) Comments C62-63.

8. **So far as consistent with applicable laws.** However, this does not mean that the owner's rights are unlimited. Other rules of law may provide restrictions, which is expressly stated in the present Article. Such rules of law may be at a constitutional level, like the European Convention on Human Rights; or be of a public law character (e.g., certain restrictions on use and alienation applicable to weapons or toxic substances, or rules concerning specific cultural objects); or be part of private law, such as the restrictions applicable to self-help under VIII. – 6.202 (Self-help of possessor). "Applicable laws" in the sense of this Article intend to include statututory provisions as well as rules of unwritten law, in particular established court practice.

9. **So far as consistent with rights granted by the owner.** Also, the owner may by virtue of the right to dispose "give away" the right to exercise certain aspects of the property right. The owner may, e.g., create a usufruct right in the object in favour of another person. If so, the owner is legally bound to respect that right and cannot, as long as this right persists, dispose of the property free of that right. The owner's rights are also subject to limited proprietary rights created by a former owner of the goods (e.g., a proprietary security right over the goods created by their previous owner) and, as the case may be, subject to limited proprietary rights created by the holder of a limited proprietary right in these goods (e.g., where the secured creditor sub-pledges the pledged goods), so far as this is possible according to the legal relationship between the owner and the holder of the limited proprietary right.

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Notes

I. The concept of ownership in a historical and comparative perspective

(a) Civil law

1. The concept of ownership, in relation to goods, is commonly defined as the owner's right to possess, use, enjoy and dispose of the goods as well as fruits, revenues and benefits which derive from them within the limits established by the law. Although it is possible to distinguish slight differences in the descriptions of the concept of ownership in the legal systems of the European legal systems examined in the following Notes, ownership, or property, is characterised by common features. Ownership is a right *in rem*. The *in rem* nature confers on such a right the characteristics of immediateness and absoluteness. "Immediateness" means that the owner's right follows directly from a legal relationship between owner and object; the owner's right (e.g., the right to use the property) does not depend on a legal relationship to another person (as e.g. the lessee's right of use under a contract of lease would depend on the legal relationship between the lessee and the lessor). "Absoluteness", on the other hand, means that other people are precluded from interfering with the owner's right: everyone must respect the owner's right (effect *erga omnes)*.
2. The wideness of such a power entitles the owner to oppose the right against whoever is in possession of the goods without being entitled thereto as against the owner or against any person who claims to have acquired a right in the goods. The owner can, therefore, exclude other people from the enjoyment of the goods or, even better, other people cannot interfere with the owner's enjoyment. In this regard, civil law countries provide the owner with a proprietary claim for the recovery of the possession of the property from anyone possessing it without legal justification *(rei vendicatio*, e.g. Austrian CC § 366; Estonian LPA § 80; Italian CC art. 948; Slovenian SPZ art. 98; German CC § 985; Greek CC art. 1094; Hungarian CC §§ 188-192; Dutch CC art. 5:2; Portuguese CC art. 1311; Slovak CC § 126; Spanish CC art. 348; Swiss CC art. 641; Bulgarian Ownership Act art. 108; see also for France: Faber and Lurger *(-Cashin Ritaine)*, National Reports IV, chap. 1.1.1.; Belgium: Faber and Lurger *(-Cauffman and Sagaert)*, National Reports IV, chap. 2.1.1.; Lithuania: Faber and Lurger *(-Mikelenas)*, National Reports III, chap. 1.2., Czech Republic: Faber and Lurger *(-Tichý)*, National Reports VI, chap. 2.5.2. See further the Notes to VIII.–6:101. Another common legal device is that the owner has claims for the recognition of the ownership, such as an action for declaration, a right to obtain an order to abstain from future interference, and usually a right to the removal of traces stemming from past interferences (e.g., Austria: Faber and Lurger *(-Faber)*, National Reports I, 30; Italy: Faber and Lurger *(-Greco)*, National Reports I, 376; Slovenia: Faber and Lurger *(-Rudolf/Rijavec/Keresteš)*, National Reports I, 523; Belgium: Faber and Lurger *(-Cauffman and Sagaert)*, National Reports IV, chap. 2.1.; Bulgaria: Faber and Lurger *(-Stoimenov)*, National Reports IV, chap. 1.4.1.; Czech Republic: Faber and Lurger *(-Tichý)*, National Reports VI, chap. 2.5.2.; France: Faber and Lurger *(-Cashin Ritaine)*, National Reports IV, chap. 1.3.; Germany: Faber and Lurger *(-McGuire)*, National Reports III, chap. 1.4.1.; Greece: Faber and Lurger *(-Klaoudatou)*, National Reports III, chap. 1.4.; Lithuania: Faber and Lurger *(-Mikelenas)*, National Reports III, chap. 1.4.; Slovakia: Faber and Lurger *(-Petkov)*, National Reports VI, chap. 1.4.1.; Spain: Faber and Lurger *(-González Pacanowska and Díez Soto)*, National Reports V, chap. 1.6.3.; Switzerland: Faber and Lurger *(-Foëx and Marchand*, National Reports VI, chap. 1.2.; Dutch CC art. 3:302; for Hungary: *Lenkovics*, Dologi jog[6], 203-204). Again, see the Notes on VIII.–6:101 for a closer analysis.
3. Traditionally, ownership is characterised as a right which is by nature not subject to extinctive prescription; the owner's right does not expire due to non-use. In some countries, this is

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stated explicitly in the code (see, e.g., French CC art. 2227; Austrian CC § 1459); in others, this was not regarded as necessary or the principle is implied in the statutory provisions (see, e.g. German CC § 194 and Bamberger and Roth *(-Henrich)*, BGB I[2], § 195 no. 35). In fact, the possibility of non-use can be regarded as one of the owner's prerogatives. However, some legal systems accept that – unlike the right of ownership as such – proprietary actions resulting from the right of ownership, like those concerning limited proprietary rights or even the action for vindication, are subject to extinctive prescription. See the Notes to VIII. – 4:101.

4. Also, ownership is characterised by elasticity, i.e. it is characterised by the aptitude to automatically regain its original extent in the event that either a third party's right *in rem,* or a constraint imposed by the general public interest, ceases to exist.

5. Historically, the notion of property started acquiring its current connotations during the times of the *Jus Quiritium.* In fact, the ages of the Roman domination were characterised by a passage from a collective exploitation of the territory to a more individualistic use of the land. The private property, so-called *dominium,* was an expression of that absolute power which the state granted to the *pater familias* (i.e. the Roman citizen) within the *familia.* The *pater familias* enjoyed an unlimited power over the goods and the people subject to his *potestas.* The characteristics of such a power, indeed, are well synthesised by the Latin locution *jus utendi et abutendi.* In fact, no limits were established by the Roman state to the authority of the *pater familias* in the enjoyment of his own private property.

6. The Roman concept of "*dominium* over the property" lost its authoritativeness after the collapse of the empire. In particular, the invasion of Germanic populations, whose economy was based on the collective exploitation of the territory, caused a fast spread of their custom and usages. Their custom, in which the concept of "commons" (i.e. a piece of land owned or used jointly by the community) assumed a relevant role, allowed an easier management and regulation of use of the territory in a period where there was a lack of central stable power. Consequently, the classical concept of *dominium* started falling into disuse.

7. The classical notion of *dominium* was not even adopted after the beginning of the second millennium, when there was a rediscovery of Roman law. On the contrary, by virtue of the spread of feudalism, property was concentrated in the hands of the king, who had the authority to delegate his power of controlling the territory to reliable people (i.e. vassals) in return for military support; power that could be in turn delegated from vassal to vassal. During the period of feudalism, it was, therefore, possible to distinguish between a general control of the territory *(dominium directum),* which corresponded to the transferor's ultimate legal ownership of the land, and an indirect control *(dominium utilis),* which corresponded to the benefit that the transferee received from having been delegated the exercise of the transferor's power. The transferor's dominion was in practice reduced to no more than an economic right to exact fees and to receive military support. The transferee had become virtually a private owner and this involved the right to use, hold, and enjoy the land *(Wood,* Medieval Economic Thought, 36). That absolute power, which had characterised the owner in Roman law, was reduced to a set of rights and faculties, which derived from the enfeoffment relationship between the transferor and the transferee. Property became, consequently, subject to different levels of power. From a monolithic dimension of the property in Roman law one passed to a fractioned dimension of property during the Middle Ages. It is in this period, indeed, that contracts which entitled other people to the enjoyment of concurrent rights *in rem* in the same piece of property (e.g. emphyteusis, personal easement, legal burden) flourished.

8. Such a fractioned dimension of property was strongly opposed during the Enlightenment. The thinkers of that time maintained that such a system encouraged the inertness of society but especially of the economy. Property had to be driven towards a more efficient use. In this regard, it is sufficient to remember that thinkers like Hume, Smith, and Kant maintained that the role of private property – in order to respect the basic freedoms of each individual – should always be taken into account when drafting laws and regulations.

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9. This new rediscovery of the importance of private property in society induced scholars to revisit the Roman notion of property. Pre-eminent among such scholars was *Robert-Joseph Pothier*. Although he was an exponent of the French *ancien régime* and hence of the feudal culture, in his works *Pandectae Justinianeae in novum ordinem digestae* he was the first to deal exclusively with the concept of *dominium utilis*, since the direct relationship between the man and object of the property lay actually in the hands of the transferee, who had the actual and tangible control of the goods. The thesis of *Pothier* allowed the resurfacing of that monolithic dimension of property which was typical in Roman law and the gradual abandonment of a concept of property mainly based on personal relationship as was typical during the Middle Ages (*Scozzafava*, La soluzione proprietaria di Robert-Joseph Pothier, 327).
10. The disappearance of feudalism and the reorganisation of the social classes in Europe after the French Revolution marked a complete recovery of the Roman notion of property. The *Code Napoléon* is a clear example of this. In art. 544 the Code stated that "ownership is the right to enjoy the use and to dispose of a thing in the most absolute way". Moreover, the Code got rid of all those property situations typical of feudalism, which were exclusively based on the personal relationship between the transferor and the transferee and which altered the absolutist nature of the ownership right. In so doing, the French legislator was also able to restore the Roman principle of *numerus clausus* of rights *in rem*. Obviously, the rediscovery of the Roman notion of property did not occur in a reverential way, but was affected by Locke and the "natural law" theories of the XVII century. On the one hand, Locke affirmed that private property was a claim to the ownership of a thing, a claim which was given by God to all human beings. Locke's theory of property is based on the idea that property should be common, but the necessity "to make use of it to the best advantage of life and convenience" gives rise to human beings' exclusive right to use and dispose of the goods. However, a human being is entitled to accumulate, use, and dispose of goods (and consequently to remove them from the common state that nature has provided) in so far as the size of his property is the result of his labour and his activity aims at satisfying his basic needs. Therefore, accumulating properties above one's own personal needs is allowed in so far as an individual exchanges them with others' goods always in order to satisfy personal needs (*Locke*, The Second Treatise on Civil Government, nos. 25-27 and 48). On the other hand, following Locke's reasoning, "natural law" theorists used "God" as the basis for their theory of property and of right to property.
11. This approach to the concept of property caused a mythicisation of the ownership right during the XIX century. The right to property was, therefore, considered inherent in the nature of human beings. Law could describe its content to a limited extent, since the right to property was not contingent upon laws or beliefs, and consequently the state could not arbitrarily dispose of the property of the individual.
12. This notion of ownership, which combines the idea of an absolute power over the goods and the idea of a fundamental right of the human being, spread through Europe by means of the *Code Napoléon*. On the one hand, this was due to the prestige of the *Code Napoléon;* on the other hand, it was the result of the policy adopted by Napoléon, which aimed at promoting his "codex" in those countries which fell under either the domain or the influence of France. Nowadays, for instance, the respective codes of Belgium (CC art. 544), the Netherlands (CC art. 5:1 (2)), Italy (CC art. 823), Portugal (CC art. 1305), and Spain (CC art. 384), enacted after the collapse of Napoléon, report a similar notion of ownership: "ownership is the right to enjoy, use, and dispose of goods exclusively and completely".
13. The situation in those countries which were affected by the Pandectist School was not so different. In fact, during the XIX century, the Pandectist School recovered completely the Roman notion of *dominium*. In this regard, it is sufficient to quote the definition of ownership given by Windscheid. Ownership, as an absolute right, is the expression of *Willensmacht*, i.e. "will power". Such a right, hence, confers on the owner immediate authority over corporeal things, i.e. the power not only to dispose of the goods "without limits" but also to prevent

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other individuals from interfering with the owner's authority *(Windscheid and Kipp,* Lehrbuch des Pandektenrechts[7], 90-99).

14. On the other hand, von Savigny described the ownership right as an expression of a civil liberty rather than a way to allocate property among individuals *(Brehm and Berger,* Sachenrecht[2], no. 1.2.). Indeed, the notion of ownership in itself was mainly affected by the philosophy of Hegel. According to Hegel, property should be regarded as a condition for the realisation of human essence. He said "[...] To have power over a thing *ab extra* constitutes possession. The particular aspect of the matter, the fact that I make something my own as a result of my natural need, impulse, and caprice, is the particular interest satisfied by possession. But I as free will am an object to myself in what I possess and thereby also for the first time am an actual will, and this is the aspect which constitutes the category of property, the true and right factor in possession. If emphasis is placed on my needs, then the possession of property appears as means to their satisfaction, but the true position is that, from the standpoint of freedom, property is the first embodiment of freedom and so is in itself a substantive end" *(Hegel,* Grundlinien der Philosophie des Rechts, no. 45). From this excerpt, Hegel's idea of property appears clear. Possession, as power over the thing, simply aims at satisfying human needs, but satisfying human needs is the intermediate point for the realisation of the individual as free agent. The power over the thing is therefore a means for the development of the individual's will. The things, which are contained in the real world, become property only as an externalisation of the individual's will, i.e. the mastery, appropriation, transformation, disposition of the things in the world make the will concrete. In Hegel's reasoning, property is therefore the embodiment of the individual's attempt to develop the individual's own powers and come to self-consciousness by the appropriation of the external world *(Thomas,* Property's Properties: From Hegel to Locke, 32).

15. Accordingly, the exercise of the right of ownership should be as free as possible, because it is only in this way that a human being can achieve freedom. In this respect the German Civil Code is a vivid example of the arbitrariness in, and lack of, limits to the prerogatives of the owner. In fact, the German CC § 903 states that the owner can dispose of the property *nach Belieben* (according to the owner's own wishes) and prevent any act by others contrary to the way the owner has decided to use the property.

16. In the Pandectist tradition property was not simply a means for appropriating the fruits of one's own work and therefore for surviving as it was understood by Locke and transfused into the *Code Napoléon,* but it was something related to the spiritual life of the human being. Property becomes the instrument for an individual's self-determination in the real world *(Thomas,* Property's Properties: From Hegel to Locke, 36). The owner, in the Pandectist tradition, has a wider power. The owner's use of the owned property is, in principle, unlimited. In this sense, ownership can be described as the most extensive right *in rem,* which gives to its beneficiary an exclusive and unlimited dominion over the object, and comprises all advantages, interests and benefits that can be taken out of it. Taken to extremes, every act expressing the exercise of an ownership right is to be considered lawful because it is the actualisation of the human being's will in reality. A number of ownership-definitions in European civil codes still reflect this approach of a universal entitlement, however often explicitly made subject to limits provided by the law itself (cf. e.g. Estonian LPA § 68, Greek CC art. 1000, Hungarian Acad Prop art. 4:13(1)-(2) and Leg Prop art. 4:14(1), Lithuanian CC art. 4.37, Slovenian SPZ art. 37; see also Portuguese CC art. 1305, which bears the strong influence not only of the *Code Napoléon*, as mentioned above, but also of the Pandectists: the owner enjoys the right of ownership "within the limits of the law and applicable legal restrictions").

17. However, describing the right of ownership (only) as a wide power over the thing would be considered unsatisfying. Nowadays, society has changed in many ways and such a notion of ownership would not solve problems like, e.g., the relationship between neighbouring owners. With this scope in mind, legislators have imposed some limits on the exercise of the right

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of ownership. In fact, the mentioned norms, both from the French and Pandectist tradition, provide that the law can establish specific cases where the exercise of one's own ownership right would be considered an abuse of law or a violation of another individual's right.

18. The merit of formulating a first general theory of the "abuse of law" belongs to two French scholars, Duguit and Josserand, at the beginning of the XXth century. The necessity of a general theory of the "abuse of law" derived from the fact that the *Code Napoléon*, created after the rise of the bourgeoisie and a source of inspiration for other civil codes, lacked a norm which forbade the exercise of any right with the sole purpose of harming another person. Such a solution had a political justification. The legislator at that time feared that the insertion of limits to the exercise of ownership could compromise those new freedoms gained by virtue of the French Revolution. Because of the increase of disputes between neighbours, the necessity of such a provision became rapidly evident to scholars of the time. It is, in fact, in this context that Duguit's and Josserand's argumentations found fertile ground. They maintained that in the current modern society, characterised by a strong interrelation between individuals, the professed absoluteness of some categories of rights should not be interpreted as if the right-holder was entitled to do whatever he wants. Absolute rights should also meet some limits, limits which derive from the necessity to balance the individuals' competing interests. In fact, the excessive power given to a right-holder by the "absolute" nature of a certain category of rights can give rise to cases where the exercise of one's own right can prejudice another person. The Roman principle *qui iure suo utitur neminem laedit* (i.e. one who exercises one's own right harms no one) had, therefore, to be replaced by the more moderate maxim *sic utere iure tuo ut alienum non laedas* (i.e. one should use one's own right in such a manner as not to injure another person's right). In this way, civilian scholars, specifically Duguit, redrew the borders of the exercise of a right, i.e. what can be considered lawful or unlawful in the exercise of one's own right. Obviously such a theory affected in turn the notion of ownership. In fact, it gave rise to the acceptance of the fact that property had to have a social function, i.e. although ownership is an absolute right which deserves to be protected from the state, it may be subject to limitations when it does not conform to public interests or it interferes with another person's rights.

19. However, the doctrinal elaborations of "abuse of law" by civilian scholars were not directly adopted by legislators at the moment at which they had to define the notion of ownership. In fact, although the definitions of ownership which one can read either in the civil codes or in property law statutes of the countries under investigation provide for the possibility to restrict its exercise by law, the expression "abuse of law" is never expressly used to justify such restrictions. Moreover, legislators do not provide for general criteria to describe the notion of "abuse of law" in the field of ownership, but prefer to regulate specific cases (e.g. nuisance, the right to light, the distance to be observed in relation to views or balconies, etc.) where the exercise of one's own right of ownership can unlawfully interfere with another person's right. On the one hand, the reason for such a solution derived probably from the fear that a judge, provided with such a wide power, may indiscriminately apply the notion of "abuse of law" in all those cases where, on the contrary, the exercise of a right could reasonably cause the compression of another party's interest. On the other hand it is arguable that the lack of such a notion is due to the fact that the concept of "abuse of law" is, actually, already consolidated in the different legal systems as being an undeniable feature of each individual's right and it is applied whenever such a right or some of its characteristics are no longer worthy of protection and social appreciation.

20. By contrast, the GREEK Civil Code gives a general definition of "abuse of law" in art. 281, according to which the abuse is generated when the exercise of a right exceeds the limits imposed by good faith, by morality, or by the socio-economic purpose of the right. The application of such a principle, according to the Greek Supreme Court (nos. 646/1969 and 680/1976), should be verified in the case of decisions concerning the restriction of ownership

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(Faber and Lurger *(-Klaoudatou)*, National Reports III, chap. 1.2.1.). The same direction has been also taken in Portugal (CC art. 334), the Slovak Republik (CC § 3), Spain (CC art. 7), and Switzerland (CC art. 2). The Portuguese CC art. 334 affirms the illegitimacy of the exercise of a right when the right-holder exceeds the limits established by law in order to protect good faith, the public morals, and the social and economic function at which the right aims *(Carvalho Fernandes*, Lições de Direitos Reais[5], no. 81). The Slovak RCC § 3(1) states that the exercise of rights and performance of duties, which aim at realising interests no longer protected by law, cannot interfere with another person's legally protected rights and interests, and cannot be inconsistent with public morals (Faber and Lurger *(-Petkov)*, National Reports VI, chap. 1.2.2.); whereas the Spanish CC art. 7 and the Swiss CC art. 2 state not only that the exercise of a right should conform to the principle of good faith but also that the law cannot protect the abuse (or the anti-social exercise (Spanish CC art. 7)) of rights. Scholars and case law look at these provisions when they have to justify limits to the ownership right (Faber and Lurger *(-González Pacanowska and Díez Soto)*, National Reports V, chap. 1.5.; Faber and Lurger *(-Foëx and Marchand)*, National Reports VI, chap. 1.2.4.).

(b) Common law

21. Property law in the **ENGLISH** common law has its roots in the feudal system introduced by William the Conqueror, Duke of Normandy, when he was crowned King of England in 1066. After the conquest, by virtue of an act of conquest, the king acquired territorial sovereignty over all of the lands and consequently had the authority to delegate the exercise of his power to reliable people (vassals) by virtue of enfeoffment. Vassals occupied their lands on the terms of some grant derived ultimately from the largesse of the Crown.
22. In this regard, it is interesting to analyse the origin of the word "estate". This word, which nowadays indicates the legal position of an owner, considered with respect to property owned in land or other things for a particular period of time, stems from the old French word *estat (état)* and this in turn from the Latin word *status*. It is clear that the word refers to the condition *(status)* of a vassal who has been invested with a tenure of land in return for military support and other feudal duties. However, the concept of "estate" was a way to overcome the medieval dogma according to which there could be no ownership of land, since the ultimate title to all the land belonged to the king. A person who received the land could not be considered the owner of the land itself but rather was the owner of an estate (i.e. a bundle of interests) in land, each estate being graded with reference to its temporal duration. Such an artificial construct was known as the "doctrine of estates", and it referred to the fact that the transferee was owner of an intangible bundle of interests in a property, rather than owner of a tangible property *(Gray and Gray*, Elements of Land Law[3], 64). In these special circumstances, the common law developed also a sophisticated concept of power to control and enjoy a physical thing, so-called "seisin", and a ritual system of transfer of such a power, so-called "livery of seisin", in the law of real property *(Bordwell*, HarvLR 34 (1921), 593-594); whereas the old Frankish-Germanic concept of "seisin" succumbed to the influence of Roman Law and became reduced to the measure of the Roman *possessio*, a position intermediate between simple detention and ownership *(dominium)*. The process of abstraction involved in the Roman idea of ownership never found its own place in the common law tradition, also because rights are conceived in terms of external phenomena *(Des Longrais*, La Conception Anglaise de la Saisine du XIIe au XIVe Siècle, 69).
23. Notwithstanding that the Roman system with its sharp distinction between ownership and possession was taking on a new lease of life in Europe, the common law was only slightly affected. Actually, scholars maintained that Roman Law was only an inspiration for the actions to protect the possessor of property against dispossession regardless of a claim to ownership *(Pollock and Maitland*, History of English Law I[2], 46; *Tate*, Ownership and Possession in

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the early Common Law, (2006) 48 AJLH, 291). Due to the influence of writings of Anglo-Norman canonists, during the late XII century it was, indeed, quite common that courts dealt with cases which clearly distinguished between possessory and proprietary claims. Moreover, the procedural actions based upon and in defence of seisin, which were suggested by the Roman *actio spolii,* became a mere preparatory step to proprietary proceedings in front of the King's Court. However, the influence of Roman Law affected particularly the procedural aspects for the recovery of property (*Pollock and Maitland,* History of English Law II[2], 40-80) but not the concept of ownership itself. English lawyers took a pragmatic approach rather than a conceptual and systematic approach to the notion of ownership. Possession was considered a *prima facie* presumption of ownership. Unless and until the presumption of ownership as deriving from the fact of possessing the goods was refuted by evidences, the possessor was considered the legitimate owner and consequently entitled to enjoy all the features of the civilian ownership, i.e. the right to use, to benefit from, and to dispose of the property, the right to retain the fruits of the property, or the right to prevent other people from interfering with the title.

24. Moreover, since, in the Middle Ages, England was characterised by civil wars, revolts, and court intrigues, it is understandable that English lawyers concentrated on developing remedies for the protection of the peaceful possession of property. A dispossessed claimant did not have to prove himself or herself to be the true owner, but to have a better right to possession than the defendant. An earlier title to possession was considered to be a better right to possession unless the title was extinguished by its non-assertion within the statutory limitation period (*Asher v. Whitlock* (1865) LR 1 QB 1).

25. The common law does not therefore have a theory of ownership like the continental legal systems. Common law scholars do not speak of the ownership right as the most comprehensive right that a person may have in respect of goods, but they circumscribe ownership as a better and undisputed title to possession. Ownership is a relative title, the strength or effectiveness of which depends upon the likelihood (or risk!) that someone may oppose a better title (*Perrins,* Understanding land law[3], 5; *Gray and Gray,* Elements of Land Law[3], 236). A further feature of the relativity of ownership is that in the case of competing parties, either the claimant or the possessor have to prove that they hold a better right vis-à-vis their own opponent, but they cannot use as a defence the fact that a third party has a better right. However, nowadays it is common to allow the defence of third party's title to be brought in any action for wrongful interference with goods. The purpose is to bring all interested parties before the court so that the issue as to ownership can be adjudicated once and for all (*Fox,* [2006] CLJ 330, 339).

26. By virtue of the "doctrine of estates", ownership as better title to possession can, however, concurrently coexist with other lesser property rights such as possession under a pledge or bailment. In fact, nothing prevents the "owner" from transferring the property or limiting the power over the goods for the security or enjoyment of another person. For this reason, scholars argue that the notion of ownership coincides with the bundle of interests which are left after lesser rights have been granted to another person (*Bell,* Personal Property, 66; *Bridge,* Personal Property Law[3], 28 et seq.). Accordingly, a person in whom such a residue of rights is vested is said to have an absolute interest in the asset; whereas one who enjoys merely specific rights has only a limited interest. Under a common description, ownership is said to be "the greatest possible interest in a thing a mature system of law recognises", consisting of a bundle of rights and incidents in respect of the thing. Among the most important of these rights are: the perpetual right to possess and enjoy the thing; the perpetual right to the fruits and profits generated by it; and the right to alienate, bequeath or destroy it (*Honoré,* Ownership, 107, *Bridge,* loc. cit., 29 et seq.).

27. The impossibility of two people concurrently being able to claim an equally "better" title to possession of the property suggests that ownership is indivisible, unless the parties hold a share

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in the sole ownership interest (e.g. joint tenancy or tenancy in common). The principle that ownership is indivisible is, notwithstanding, subject to an important exception applying to equitable ownership. Equitable ownership was the response of equity to the injustice created by the application of the common law principle of ownership to unconventional arrangements in relation to land during the Middle Ages (*Gravells,* Land Law[2], 27). In fact, in that time it was quite common that a landowner, in order to manage property in a more flexible manner or to avoid some of the onerous enfeoffment duties deriving from the transfer of the property to heirs, used to transfer the estate to a feoffee. The feoffee enjoyed the possession of the land but was personally obliged to transfer the benefit of the use to the landowner or the landowner's heirs.

28. The recognition by means of rules of equity of such forms of exploitation of properties gave birth to a new institution, the trust. Trust, in English law, occurs when two people own the same property at the same time. It may arise by operation of law, by parties' agreement, or by implication. The person to whom the property is transferred is considered the legal owner *(trustee)* and is compelled to hold the property for the benefit of another person. However, the *trustor,* the person who settles the trust, can appoint himself or herself as trustee. The person for whose benefit the trust is created is called the *beneficiary* or *equitable owner (Bell,* Personal Property, Chapter 7).

29. Equity treats the beneficiary as owner of the property: the beneficiary can use, dispose of, or benefit from this equitable property. The beneficiary's interests in the property are protected accordingly, providing equitable remedies parallel to those available to a legal owner. However, equitable ownership is less secure than full legal ownership. In fact, the interests in the property of the equitable owner fail to be protected against the *bona fide* purchaser, for value and without notice, of the legal ownership of the property.

30. Finally, **SCOTLAND** deserves particular attention. In spite of the proximity and economic influence of England, and a voluntary political union with England, Scotland was able to preserve the independence of its legal system. Actually, its legal system is based largely on Roman law, as revived and understood by the Glossators, with influences of Common Law. In line with the civilian property law system, the standard definition of ownership is *the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction (Erskine,* An Institute of the Law of Scotland II[8], para. 1.1.). The owner is entitled to use and enjoy the property exclusively and completely. However, such an absolute power can be limited by law, and parties' agreement can limit and prevent the owner from making a particular use of the property *(Bell,* Principles of the Law of Scotland[10], no. 1284; Faber and Lurger *(-Carey Miller/Combe/Steven/Wortley),* National Reports II, 319 et seq.).

(c) Scandinavian legal systems

31. In order to understand the so-called functional approach to the Scandinavian concept of ownership it is necessary to briefly analyse the historical development of the Nordic legal systems. Although Scandinavian law is not historically connected with Common Law, the legal developments in **FINLAND, SWEDEN, DENMARK, NORWAY** and **ICELAND** were minimally affected by Roman law. The influence of Roman law occurred indirectly by virtue of the relationships that Nordic countries established with the neighbouring Germany. However, historical, political, and geographical reasons explain why a unique and strong harmonisation in the field of law was possible among these countries, without Roman law playing an important role *(Zweigert and Kötz,* An Introduction to Comparative Law[3], 277).

32. The interrelation between these countries dates back to the Kalmar Union of 1397, formed by the Kingdoms of Denmark, Norway and Sweden, including the territories of Iceland, Greenland and parts of Finland. A certain influence of continental European private law traditions gained ground in the XVIIth and XVIII centuries, which were a period of flourishing

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commercial relationships with the rest of continental Europe. In 1630 Sweden was openly and successfully involved in the ongoing Thirty Years' War, since the King Gustav II Adolf saw in the war an opportunity to gain control over the northern German states bordering the Baltic Sea and therefore to create a Swedish *mare nostrum*. At that time in these states the *usus modernus Pandectarum* (i.e. the German legal production, which has its root in the Roman law tradition) was flourishing both in legal practice and in the universities. Consequently, in consideration of the Swedish political and territorial interests in the Baltic area, it was common for young Swedish noblemen, interested in a career either in the administration or in legal practice, to receive their legal training in *jus commune* at a German university. Moreover, one of Gustav II Adolf's administrative reforms introduced a new Supreme Court, in which career judges, familiar with the *jus commune*, worked (*Zweigert and Kötz*, An Introduction to Comparative Law[3], 279).

33. After Sweden's hegemony in the Baltic Sea had started to decline, Denmark being involved in the Napoleonic Wars and Finland, formerly part of the Swedish Kingdom, became part of the Russian Empire in 1809 (however keeping its autonomy from the tsarist administration, without ever really breaking off its tie with Sweden), the Nordic countries started a period of political isolation, which caused an uprising of national sentiment. This was more evident in the legal reforms during the XVIIIth and XIXth centuries. In fact, although Scandinavian scholars and public officers, who knew Roman law, never broke their intellectual relationships with their continental colleagues, in the implementation of their local legal system they paid more attention to their own legal tradition (*Zweigert and Kötz*, An Introduction to Comparative Law, 279-280). In particular, stimulated by a sense of common historical and cultural heritage, the Nordic countries started to co-operate intensively in the field of legislation. This co-operation was characterised by the fact of taking into consideration the commercial interests involved and therefore of paying attention also to the mercantile practice.

34. Such a co-operation produced its effects not only in the field of commercial law but also in the field of property law. Especially, at the end of the XIXth century, Scandinavian scholars started to criticise the Roman notion of ownership and in particular the idea that by virtue of the transfer of ownership the transferee acquired a full status of an "owner" in relation to everyone at a fixed specific time. In this regard, scholars maintained that the traditional notion of ownership was only a theoretical construction, which did not pay sufficient attention to the reality. The Danish professor *Carl Torp* was a fiery supporter of such a criticism. He introduced, for the first time, this idea in his book *Dansk tingsrett* (Kjøbenhavn 1892), but it was only in 1902 during the convention of the Nordic lawyers (*Forhandlingerne paa det nordiske Juristmøde i Kjöbenhavn 1902)* that his words suggested a new approach to the definition of the ownership (Faber and Lurger *(-Lilja)*, National Reports V, chap. 1.5.).

35. In his work, Torp underlined that the word "ownership" implied different problems, which should be separately handled. Precisely, in Torp's opinion, ownership denotes a different number of legal facts to which different legal consequences should be reconnected. Consequently, a clear and precise definition of ownership is considered impossible and the attempt of the continental scholars to find such definition becomes sterile. During the XXth century other scholars joined his view; among them Fredrik Vinding Kruse in Denmark, Sjur Lindebrække in Norway, and Bo Östen Undén in Sweden. The latter, for instance, stated that "the legal concept of ownership contains neither a social program nor a natural law idea. Since, from the Government authorities' examination of what the society's and the individuals' interests predict, legal rules on the ownership's extension or limitation have emerged, the law adjusts the concept accordingly. Thus, the ownership is a relative concept and a 'functional concept'. It is based on applicable legal rules and is used as a formula or a denotation-unit" (Faber and Lurger *(-Lilja)*, National Reports V, chap. 1.4. and 1.5.; *Undén*, Svensk sakrätt 1, Lös egendom[1], 85).

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36. Although it is undeniable that Torp made the breakthrough in the new approach to the notion of ownership, the Uppsala School, the most influential exponents of which were *Vilhelm Lundstedt, Axel Hägerström, Karl Olivercrona,* and *Alf Ross*, contributed more widely to the conceptual critique of the notion of ownership. These scholars criticised the attitude of modern jurisprudence to use the concept of right as being an element which corresponds to an empirical fact. For instance, the legal idea associated with property and ownership has nothing to do with reality. An ownership right is not directly observable and testable in reality, but as soon as one tries to determine the empirical facts on which property rights should be based and to which the state should grant protection, one cannot get out of facing conceptual difficulties. According to *Hägerström,* what one can see is the result of a juridical act and, in the case of property, the protection of one's own possession granted by the state-sanctioned coercion power once one has concretely lost possession of the thing (*Alexander,* 50 AJCL 131, 151). In Germany, the *Historische Rechtsschule,* and especially von Jhering, defined the right of ownership as a legally protected interest. According to Scandinavian scholars, such a definition was flawed. In this regard, Lundstedt underlines that, if is true that the ownership right is a legally protected interest, such a protection should exist in the same moment when the owner is exploiting or using the thing. By contrast, such a protection exists only ex post by virtue of the procedural claim granted to the owner by the state. The idea that the right to ownership gives to a person a full power over a thing is just a fiction, a myth. An ownership right engenders only a feeling of power. Rights, in fact, cannot be referred to as empirical facts, but are devices to which particular effects in the world of facts correspond. Precisely they are devices by virtue of which the state's power can maintain order among consociates (*Alexander,* loc. cit., 155). Therefore, the authority over or the ownership title to a thing and its limits are the consequence of this mechanism created by the state's power in order to guarantee the social order. In this regard, *Olivercrona* considers superfluous the effort made by continental lawyers to create a link between ownership right and thing. In fact, he underlines that expressions like "this is my property" or "this is not my property" do not refer to an empirical link between one's own property right and the thing over which one exercises one's own power of control, but refer to the psychological connection between the above-mentioned statements, the behaviour which a person can adopt in relation to the thing, and the consequences which follow the adoption of certain behaviour (*Alexander,* loc. cit., 159; *Olivecrona,* ScanStudL 3 (1959), 125, 144).

37. The consequences of this critique of the continental notion of ownership led to the abandonment of a theoretical and comprehensive definition of the concept itself. It is a matter of fact that, nowadays, the word "ownership" is part both of the legal jargon and of the everyday language in the Nordic countries, but it is cleansed of every potential conceptual implication, so that ownership is describable as a set of a different number of legal facts and legal consequences, to which the person, who – for reason of communicative simplicity – is called owner, is subject (Faber and Lurger *(-Lilja)*, National Reports V, chap. 1.4. and 1.5.; Faber and Lurger *(-Færstad)*, National Reports V, chap. 5.2.1.; *Kartio,* Esineoikeuden perusteet, 21; *Martinson,* Transfer of Title Concerning Movables III, National Report: Sweden, 22 et seq.).

38. The concept of ownership is therefore separated into its constituent elements and Scandinavian lawyers prefer to deal with them as if each single element was an aspect of a small coherent legal system, which takes into account empirical evidence and does not depend on *a priori* defined concepts. Accordingly, in the case of competing parties, the judge will analyse the case in its essential elements, and will decide which of the contending positions should have "priority" over the other, so that the question "who should be the owner?" will not even be taken into consideration. In this way, such an approach to the concept of ownership, according to Scandinavian scholars, seems not only to avoid the risk of having a judicial solution reasoned by a process of deduction but also to solve the dispute between the parties by weighing the relevant interests in the specific case. Scandinavian property law

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is "functional" in that: it is able to investigate the reality, for the protection of parties' interests, without the need of any metaphysical legal notion (cf., *inter alia, Martinson,* Transfer of Title Concerning Movables III, National Report: Sweden, 9 et seq.; Faber and Lurger *(-Lilja)*, National Reports V, chap. 1.4.).

39. In this regard, scholars tend to distinguish between the static and the dynamic field of property law. With the expression "static field of Property Law", Scandinavian scholars refer to rules which ensure that a person who has acquired an "interest" in property can enjoy the use of that asset. The right to take possession, to use, and to vindicate the goods and their fruits (i.e. the privileges and the benefits which derive from being considered owner) are examples of the static aspect of ownership. "The dynamic field of Property Law" refers to the power of the owner to dispose of the goods, or to assure creditors of payment by the pledging or mortgaging of property. With respect to the power of control, third parties cannot act in such way as to interfere with the owner's use of the goods. If interferences do occur, the right to bring a claim for damages would fall within the scope of the owner's static power. On the other hand, the owner cannot abuse the power over the goods in order to harm other people. In connection with this, it is important to underline that all those acts concerning the regulation of the relationship between owner and the other consociates are considered issues of public law rather than issues of private law. In fact, the state not only grants a wide power to the owner, but can also, by legal provision, circumscribe such a power over the goods *(Hessler,* Allmän sakrätt, 6 et seq.; Faber and Lurger *(-Lilja)*, National Reports V, chap. 1.3 and 3; Faber and Lurger *(-Kuusinen),* National Reports V, chap. 1.4.). As said above, the balance between these two aspects of ownership, i.e. the power to use one's own goods according to one's own needs and desires and the limits to the use of them in order to prevent harm to other people, aims at keeping stable the delicate *status quo* among individuals.

40. Both static and dynamic elements are employed for describing when a person can be considered as the "owner". Using the wording of the Finnish scholar *Simo Zitting* (*Zitting,* Omistajan oikeuksista ja velvollisuuksista, 387-401 and 501-531), the elements which characterise a full legal owner are three: 1) the right to control the property; 2) the right to dispose of the property; 3) and the right of the possessor of the property to be protected from the claims of third parties. Others stress, apart from the right to use, control and dispose of the property, the incident of using one's right as a basis for assuming obligations towards others, i.e. the fact that the property forms part of a person's estate which in turn forms the basis for economic relationships (cf. *Hessler,* Allmän sakrätt, 20 et seq.). A strict distinction between "property rights" and "obligations" in the sense of rights *in rem* (in the sense that rights against other people follow from the right of one person towards a thing) and mere personal rights against another for the performance of an obligation is, however, not considered very persuasive and is often not followed strictly (Faber and Lurger *(-Lilja),* National Reports V, chap. 3.; *Hessler,* loc. cit., 1 et seq.).

41. Analysing a transfer of property will, in a Scandinavian understanding, encompass issues like: the parties reaching a binding agreement; the passing of risk; and when, or until when, a party is protected as against the other parties' general creditors. As indicated above, a strict distinction between what may, in other European legal systems, constitute a matter of "contract law" from matters of "property law" and "insolvency law", is not considered useful. Many issues will be decided by simply referring to the terms of the contract, without posing questions of "ownership", e.g. whether a seller is entitled to use the goods before delivery *(Martinson,* Transfer of Title Concerning Movables III, National Report: Sweden, 39 et seq.; Faber and Lurger *(-Lilja)*, National Reports V, chap. 1.4., 3. and 4.4.1.). The main issues usually associated with a property law implication in a more narrow sense are, in particular: a party's protection against the other party's creditors; the conflict between competing acquirers of the same goods; and good faith acquisition from a person not entitled to the goods – in other words: when it comes to the question of protection against third parties (cf., e.g., *Hessler,*

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Allmän sakrätt, 8 et seq.; *Håstad,* Sakrätt avseende lös egendom[6], 16 et seq.; Faber and Lurger *(-Lilja)*, National Reports V, chap. 1.4., 4.-7.). These issues will be dealt with more thoroughly in the Notes to VIII. – 2:101 et seq., VIII. – 2:301 and VIII. – 3:101.

II. *Constitutional guarantee of the right of ownership*

42. In several European legal systems, the right of ownership is granted not only by private law, but also by the constitution. However, the ownership right does not have the same value in all the constitutions. In some constitutions, ownership is considered a fundamental right of human beings. This is the case in **FRANCE** (Preamble of the French Constitution of October 4, 1958; Declaration of the Rights of Man and of the Citizen of 1789 art. 17 where property is granted and protected and ownership rises to an inviolable and sacred right. At the time of the French Revolution property was, in fact, considered a social guarantee and necessary instrument for the civilisation of society *(Thiers,* De la propriété, 34; *Proudhon,* Traité du domaine de propriété ou de la distinction des biens, 8), whereas nowadays property is considered as the essential expression of an individual's freedom.
43. By contrast, in **BELGIUM** (Const. art. 16), the **NETHERLANDS** (Const. art. 14), and **SWEDEN** *(Regeringsformen* Chap. 2, art. 18.), there is no express provision which grants the right to property but it is recognised that limits to the right of ownership must be based on law and, if property has to be expropriated, the right-holder has to receive compensation for the loss.
44. In other legal systems (**BULGARIA**: Const. art. 17; **ESTONIA**: Const. § 32; **HUNGARY**: Const. § 17; **LITHUANIA**: Const. art. 23; **POLAND**: Const. art. 64; **PORTUGAL**: Const. art. 62; **SLOVENIA**: Const. art. 33; **SWITZERLAND**: Const. art. 26; **DENMARK**: Const. § 73; **FINLAND**: Const. § 15; **NORWAY**: Const. arts. 104 and 105), although the right to property is granted and protected by the constitution, the constitution itself expressly states that the right-holder may be subject to limits or expropriation of the property when the exercise of the ownership right is in conflict with the public interest.
45. In other legal systems (**CROATIA**: Const. arts. 48 and 50; **GERMANY**: Const. art. 14; **GREECE**: Const. arts. 17 and 18; **SLOVAK REPUBLIC**: Const. § 20; **SPAIN**: Const. art. 33; **ITALY**: Const. art. 42; **CYPRUS**: Const. s. 23; **IRELAND**: Const. s. 43), the right to property is granted and protected but the right of ownership should be exercised in order to promote a general improvement of the society. Accordingly, in order to achieve the common good, property may be subject to expropriation. In all of these cases, property acquires a social function, the notion of which is wider than the one of "public interest". In fact, whereas public interest refers to the needs of the community which can be achieved by the activity of the state and of the public institutions, the expression "social function" refers both to the fairness, which should be adopted by the owner in the exercise of the ownership right vis-à-vis the other private-interest-holders, and to the general benefit that the whole society should receive by virtue of the exercise of such a right.
46. Both of the two expressions ("public interest" and "social function"), however, give rise to interpretative problems. On the one hand, there are no general criteria to determine in advance when the exercise of one's own right of ownership is contrary either to the public interest or to its social function. Actually, the constitutions delegate to the parliaments or to the governments the duty to coordinate the private interests with the interests of the society, i.e. the duty to identify the limits to the right of ownership, and the procedures to carry into effect such restrictions. On the other hand, there are three important issues: 1) does a limitation of ownership give a right to compensation 2) what is the borderline between limitation and expropriation 3) should one consider as expropriation only those acts which deprive the owner of the goods or also those acts which limit the use and enjoyment of the goods?
47. These questions are strictly interrelated, since the constitutions of the countries under investigation grant compensation in the case of expropriation and not in the case of limitations.

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Only **CROATIA** (Const. art. 50) expressly grants compensation also in the case of restrictions on the right of ownership. The issue concerning the borderline between limitation and expropriation is widely debated and a unique solution does not exist. However, in this regard, it is interesting to consider the solution supported by German and Italian scholars *(Raiser,* Das Eigentum im Deutschen Rechtsdenken seit 1945, 775; *Bianca,* La proprietà in Diritto Civile, 179). In their opinion, the holder of an ownership right may be entitled to compensation if the limitation concerns specific goods and the sacrifice, which the owner should bear, is such that the right turns out to be completely deprived of its effects.

48. Finally, the criteria to determine the amount of compensation are different. The constitutions of **HUNGARY** (Const. § 13), the **NETHERLANDS** (Const. art. 14(1)), **SWITZERLAND** (Const. art. 26(2)), **FINLAND** (Const. § 15(2)), and **NORWAY** (Const. § 105) speak of full compensation. The **GREEK** constitution (Const. art. 17(2)) speaks of full compensation corresponding to the value of the expropriated property at the time of the court hearing on the provisional determination of compensation. **BULGARIA** (Const. art. 17(5)), **PORTUGAL** (Const. art. 62(2)), the **SLOVAK REPUBLIC** (Const. § 20(4)), **SPAIN** (Const. art. 33(3)), and **CYPRUS** (Const. s. 23(3)) speak only of fair, adequate, proper, or just compensation. The **GERMAN** constitution (Const. art. 14(3)) states that compensation has to be determined upon a just consideration of the public interest and of the interests of the persons affected by the dispossession. Only **CROATIA** (Const. art. 50(1)) provides that the compensation should be equal to the market value of the expropriated goods. In the other legal systems, the constitutions do not specify whether the compensation should be fair. However, an answer to the problem can be found in a decision of the European Court of Human Rights (ECHR Division IV, *Mason et alii v. Italy,* May 17, 2005). The Court affirmed that compensation has to aim at establishing the *status quo* before the expropriation. Therefore, if the return of the property is not possible, compensation should be equal to the market value of the property and to the potential damage suffered by the expropriated party.

III. The content of the concept of ownership in the European legal systems today

49. Under **AUSTRIAN** private law the right of ownership is the most comprehensive legal position a person can have over property. The owner is entitled to use the asset, to manage the property and, therefore, may also allow others to use it. The owner is entitled to physically alter, use up or destroy his or her property and to dispose of it. Based on the absolute nature of the right of ownership, the owner is entitled to recover the property from any other person (right of *revindication*, CC § 366). If the property becomes the object of enforcement proceedings against another person, the owner can bring a special action in order to stop the execution proceedings (*Exzindierungsklage*, EO § 37). If the property becomes involved in insolvency proceedings against another person, the owner can separate the asset from the insolvent person's estate (*Aussonderungsrecht*, KO § 44). The owner is also entitled to stop interferences other than dispossession, to prohibit future interferences, and to claim for restitution to the previous condition (*actio negatoria*, CC § 523). There are also further consequences of the absolute nature of the right of ownership: the owner is entitled to claim damages where the property has been injured by a tort committed by another person, and to claim the reversal of unjustified enrichment, if his or her property has been used by another person without being entitled to do so (CC § 1041). See Faber and Lurger *(-Faber),* National Reports I, 19 et seq.

50. Equally ownership is the most comprehensive of all proprietary rights under **ESTONIAN** private law. The right of ownership entitles the owner to possess, to use and to dispose of the owned asset. The right to renounce ownership or to physically destroy the asset are part of the owner's general right of disposition over the asset. *Revindication* (LPA § 80) is the owner's claim for recovery of possession in cases where the owner has been deprived of the possession of his or her asset. A so-called negatory action (LPA § 89) is available where the owner has

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retained possession of the property but is hindered in the enjoyment thereof. The action is directed towards the restoration of the former condition and/or the interdiction of further interferences by the defendant. The owner is entitled to claim damages under the rules of non-contractual liability for damage if the property has been damaged as a result of an unlawful conduct of another person. The various types of claims ex unjustified enrichment form the basis of the reclamation of proprietary values that a person has obtained without a legal ground at the expense of the owner. Upon the declaration of bankruptcy of a third party holder, an asset belonging to the owner will not become part of the bankruptcy estate and the owner can recover possession of his or her asset. Upon the opening of execution proceedings against a third party holder, movables among the seized objects belonging to the owner will be relieved of the seizure upon an application of the owner, if it is evident that the applicant is the owner of the movable. If relief is denied, the owner may file a claim for relief in court. See Faber and Lurger *(-Kullerkupp)*, National Reports I, 236 et seq., 241 et seq., 244 et seq.

51. According to the **ITALIAN** CC art. 832, ownership is the right to enjoy and use goods exclusively and completely (within the limits of and in conformity with the duties established by the legal system). The right of enjoyment includes every possible use of the goods. It also comprises the right not to use and the right to destroy the goods *(ius utendi et abutendi)*. Furthermore the owner is entitled to dispose of the property. *Vindicatio* is the action by means of which the owner asserts his or her own property right when another person unlawfully exercises possession or *detenzione* (custody) of the goods (CC art. 948 (1)). The so-called *azione negatoria* aims at the declaration of the inexistence of another person's rights, as well as the prevention of this person from causing possible interferences and disturbances in the future (CC art. 949). Furthermore, the protection of property can also be achieved by claims under the rules on liability for damage, if the relevant prerequisites are satisfied, and by claims for the reversal of an unjustified enrichment, provided that another person is unduly enriched to the detriment of the owner (CC art. 2041). See Faber and Lurger *(-Greco)*, National Reports I, 354 et seq., 370 et seq., 378 et seq.

52. According to the **SLOVENIAN SPZ** art. 37 (1), the right of ownership includes the right to own an asset, to use it and to dispose of it. The owner is even allowed to destroy the asset. According to SPZ art. 92 (1), the owner can claim for the recovery of possession of an individually ascertained asset by bringing an action that is based on the right of ownership *(rei vindicatio)*. According to SPZ art. 99 (1), the owner can bring a claim for the termination and future prevention of an unlawful disturbance *(actio negatoria)*. Furthermore, the owner can bring a claim for the reparation of damage done to his or her property by a third-party tortfeasor on the basis of Code of Obligations art. 131 et seq. The owner is also entitled to a claim for the reversal of an unjustified enrichment: where another person is enriched, without any legal justification, to the disadvantage of the owner, the former is obliged to return the received asset, where this is possible; otherwise, he or she is obliged to financially compensate for the value of the asset. In the case of insolvency procedures against a debtor, who is holding an asset belonging to the owner, the latter can claim for the separation of the asset from the insolvency estate (ZPPSL art. 131 (1)). See Faber and Lurger *(-Rudolf/Rijavec/Keresteš)*, National Reports I, 516, 518, 523 et seq., 580.

53. Also in **GERMAN** law ownership is the most comprehensive and all-embracing property right. A legal definition of the notion of ownership is contained in CC § 903. The two most important legal powers of the owner of a thing are: first, the right to make (economic) use and to obtain the value by legal transaction; and, second, to either exclude any third party from its use or to share its use. The right to (re-)claim possession of the property is provided for by CC § 985 *(Vindikation)*. This remedy is supplemented by a set of rules governing the so-called owner-possessor-relationship (*Eigentümer-Besitzer-Verhältnis;* see the Notes to Chapter 7 of this Book). According to Insolvency Act § 47, the owner's right of vindication has effect in the case of insolvency of the person possessing the property. CC § 1004 provides a remedy for

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the termination of other kinds of interference with the property, for the removal of traces of past interference, and for the prohibition of future interference. According to CC § 823 (1) a person who, acting with intention or negligence, unlawfully damages another's property is liable to compensate the owner for any damage arising therefrom. Furthermore the owner is entitled to claim compensation based on the provisions on unjustified enrichment. See Faber and Lurger *(-McGuire)*, National Reports III, chap. 1.2., 1.4.1. and 1.4.2.; *Brehm and Berger*, Sachenrecht[2], 103 et seq.

54. **GREEK** CC art. 1000 defines the rights linked to ownership: the owner has the power to use the thing, he or she is entitled to administrate and manage the property and, therefore, may allow the use of it by others *(παραχώρηση χρήσης)*. The owner has the right to dispose of the property, he or she can physically alter, use up or destroy the property; the owner can also abandon his or her right by dereliction and lose ownership entirely. The owner has the right to recover the property from anyone who is withholding it from him or her without a valid legal title (CC art. 1094: vindicatory action, διεκδικητική αγωγή). Where the right of the owner is disturbed in a way other than by deprivation or retention of the goods, the owner can claim, according to CC art. 1108, the cessation of the disturbance and for prohibition of such disturbance in the future (prohibitive action, αρνητική αγωγή). The prohibitive action is also a preventative action for a permanent injunction against an imminent infringement of ownership. Additionally, the owner can protect his or her right where the property has been subject to an execution proceeding (Τριτανακοπή, Greek Civil Procedures Law art. 936), or to an insolvency proceeding against another person (αποχωρισμός/πτωχευτική διεκδίκηση, Greek Insolvency Code art. 37-40). Where the property has been affected by a wrongful act, the owner is entitled to claim damages from the offender. Furthermore the owner has the right to the reversal of unjustified enrichment where another person has been using his or her property without being entitled to do so. See Faber and Lurger *(-Klaoudatou)*, National Reports III, chap. 1.2. and 1.4.

55. The **HUNGARIAN** CC does not include an explicit legal definition of the notion of ownership; however, one may reach an indirect definition by the provisions on the interests linked to the right of ownership. The owner is entitled to possess, use and exploit, and to dispose of the property. The owner may at any time abandon his right of ownership of a movable (CC § 112 (1)); he or she may even destroy the asset. The owner may apply for the cessation of the illegal possession by an unlawful possessor and for the possession to be returned (*rei vindicatio*, CC § 115 (3)). This remedy is also effective in the case of the other party's insolvency. The so-called recovery claim concerning property seized in the course of judicial enforcement proceedings is provided in §§ 371-383 of the Hungarian Code of Civil Procedure. Furthermore the owner is entitled to use an action protecting against disturbance of ownership (*negatoria in rem actio*, CC § 115 (3)). See Faber and Lurger *(-Szilágyi)*, National Reports III, chap. 1.2.1.(a), 1.2.2., 1.4.2. Regarding the unjustified enrichment regime and the non-contractual and contractual liability regime in conjunction with the protection of ownership see Faber and Lurger *(-Szilágyi)*, National Reports III, chap. 1.4.2.(f)-(h).

56. According to **LITHUANIAN** CC art. 4.37 (1) the right of ownership is the most comprehensive and important proprietary right; it is defined as the right to possess, use and dispose of the property. According to CC art. 4.37 (2) the owner enjoys the right to transfer the entire object of the ownership rights to another person, or a part thereof, or only specific rights that are provided in CC Art. 4.37 (1). The owner has the right to vindicate his asset from another's illegal possession (CC art. 4.95, *vindication action*). According to CC art. 4.98, the owner may claim for the cessation of all violations of his or her right, even if such violations do not involve the loss of possession *(negatorian action)*. The owner may claim damages on the basis of non-contractual liability arising out of damage caused to another. The claim for damages is used in the event of the destruction or damage of a thing, and also in cases where the vindication of a thing is not possible. The owner may also claim the reversal of unjustified

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enrichment, if his or her property has been used by another person without being entitled to do so. See Faber and Lurger *(-Mikelenas),* National Reports III, chap. 1.2.1., 1.4.

57. In **FRANCE** the right of ownership is the most important and comprehensive right *in rem*. According to CC art. 544 the owner has the right to use the property and to dispose of it. The owner may also change the substance of the thing or even destroy it. The owner has the right to follow the property wherever it is *(droit de suite)*, which means in particular that the owner of a thing is entitled to reclaim possession of the thing if it is held by a third person *(action en revendication – action pétitoire)*. No specific provision of the CC regulates this right, yet its existence derives from the principal characteristics of property rights. If the third party holder is subject to an insolvency proceeding, the owner may revindicate his or her movable within a period of three months from the publication of the initiation of the proceeding, to avoid seizure by the creditors of the possessor (Ccom art. L 624-9). Similar rules exist in the case of execution proceedings against the third party holder. Pursuant to the *action négatoire* the rightful owner can act against a third party to deny real rights the third party pretends to have. Further, there is a general principle in French law which states that any damage done to a third party must be repaired, whether this damage was caused by wrongful behaviour or not (CC art. 1382 and art. 1383). In this respect, any damage caused to property must be repaired by those liable. As a rule, any disturbance of ownership rights is wrongful behaviour. French law also provides for compensation if a person's property suffers an undue loss, whereas somebody else benefits from this loss (action *ex* unjust enrichment, CC art. 1376: *enrichissement sans cause,* action *de in rem verso*). See Faber and Lurger *(-Cashin Ritaine),* National Reports IV, chap. 1.2.2., 1.4.

58. **BELGIAN** CC art. 511 defines the right of ownership. The owner has the power to use and to dispose of the property in the most absolute manner (nowadays however, one accepts that there are forms of indisposable ownership). The main property action related to ownership is the action of recovery of property *(revindication)*. This remedy most frequently exists alongside another remedy, e.g. a contractual action or a tort claim. If, for instance, the owner has given his car in deposit to a friend, he has the choice to recover his car by a contractual claim or to do so by revindication. The latter has the advantage that the claimant will not suffer the consequences of an insolvency proceeding against the custodian. An owner can also exercise an *actio negatoria* or an *actio confessoria*. The former seeks to have a judge recognize that a third person has no rights in the asset, the latter seeks to have a judge recognize that a right in an asset held by another person does exist. See Faber and Lurger *(-Cauffman and Sagaert),* National Reports IV, chap. 2.1., 2.3.

59. Although there is no legal definition of the right of ownership in **BULGARIAN** private law, there is broad consent in the literature that the right of ownership includes the right of the owner to possess, use and dispose of a specific asset, including the power to demand from every third person not to interfere with the asset. Ownership is the most comprehensive property right. In particular, the owner is entitled to revindication (*rei vindication*, art. 108 Ownership Act) which may be exercised against possessors and holders of the asset who do not have a legal ground to possess or to hold it. The claims regarding the protection of property rights are not suspended or precluded by the opening of insolvency proceedings against the third party possessor or holder. This is provided for by a new paragraph in Ccom art. 637 (5) no. 1. The "negatorian" action (*actio negatoria*, Ownership Act art. 109) can be exercised to prevent interference with the property by a third person. In addition to the remedies of protection of ownership provided by property law, there are several remedies under the law of obligations: claims for damages (tort law) and claims for unjustified enrichment. For further information see Faber and Lurger *(-Stoimenov),* National Reports IV, chap. 1.2.1., 1.2.3., 1.4.

60. Traditionally, the **POLISH** CC recognises ownership as the most complete of all real rights. The owner is entitled to use the asset and to dispose of the property, which includes its abandonment. The owner has the power to exclude others from the use of his or her property

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and therefore can bring appropriate actions against the person infringing his or her right. Depending on the manner of infringement, the owner is entitled to either an action for recovery of the thing *(rei vindicatio)* or a negatorian action *(actio negatoria)* (CC art. 222), but may also resort to other remedies against the possessor of the thing defined by the science of law as complementary actions (CC art. 224 and 225). The complementary actions include the actions of an owner for remuneration for use of a thing, for return of fruits or payment of their value and for repair of damage caused by impairment of a thing. For more details see Faber and Lurger (*-Pisuliński and Zaradkiewicz*), National Reports IV, chap. 6.1. and 30. For the effects of declaration of insolvency see *Pisuliński and Zaradkiewicz*, loc. cit., chap. 19.

61. The right of ownership has no legal definition in **PORTUGAL**. However, CC art. 1305 includes some elements that help determining its contents which show that the right of ownership includes all the conceivable powers one may have over a thing. These powers relate to the use, fruition and disposability of the thing. According to CC art. 1311 the owner may demand in a court of law that any possessor or detainer of the thing must recognize the owner's property right and restore the property (action for revindication). Additional remedies an owner may use are, inter alia, the remedy for compensation for damage and claims for compensation because of unjust enrichment. For further information see Faber and Lurger *(-Caramelo-Gomes and Nóbrega),* National Reports IV, chap. 1.4.3., 1.6.

62. The **SPANISH** CC art. 348 defines the legal concept of ownership *(propiedad* or *dominio)* as a real right granting the title-holder total dominion over a specific corporeal thing, including, in principle, all possible powers over it (use, enjoyment, disposal, etc.). Ownership is, therefore, the most comprehensive property right. The owner may also extinguish ownership through abandonment *(derelictio)*. The action for revindication is the proprietary action granted to the owner against a person who illegally possesses the thing, in order for the owner to obtain a judicial declaration of his or her right, and the restitution of the – factual or legal – possession of it (CC art. 348 (2)). By exercising the so-called *tercería de dominio* (LEC arts. 595 et seq.), the owner of an asset that has been seized for the satisfaction of another's debts – be it an executive seizure or a preventive one – can have the seizure reversed (action based on ownership against execution by third party). If a debtor who is in possession of the owner's asset is subject to a declaration of bankruptcy, a right of separation of the property from the bankruptcy estate is granted to the third party owner (LC art. 80). The owner may also exercise a declaratory action for ownership against any person who contests the former's ownership, in order to obtain a judicial declaration of his or her right. Furthermore, the owner can resort to a negatorian action against another person who claims to be title-holder of a limited proprietary right in the property (e.g. a right of easement), in order to obtain a judicial declaration against the existence of such right. Where the defendant has interfered with the owner's right based on such alleged limited right, the owner may also obtain compensation for damage. Also, the legitimate interests of the owner may be protected through the exercise of other actions. For example, the rules on non-contractual liability provided by CC arts. 1902 et seq. and different special legislation, including some rules of the CP particularly referring to the liability for damage caused as a consequence of criminal offences (see CP arts. 109 et seq.), allow a claim for compensation for damage caused to another person's property by another's fault and, in some cases, even for purely objective reasons. Furthermore, the owner may bring a claim based on the doctrine of unjustified enrichment, which is not expressly provided for by Spanish law, but is unanimously acknowledged as a "general principle of law" and which is therefore applicable in default of law or custom, CC art. 1. According to this doctrine, any person who is enriched at the expense of another without the justification of a cause deemed as sufficient by law is obliged to compensate, within the limits of his or her own enrichment, the damage suffered by the latter, regardless of fault. See Faber and Lurger *(-González Pacanowska and Díez Soto),* National Reports V, chap. 1.5., 1.6. and 5.1.

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63. Under **DUTCH** property law, only corporeal objects can be the object of the right of ownership. The owner is entitled to use the object to the exclusion of everybody else, to dispose of it and to revindicate it. The owner enjoys a *droit de suite*, which allows him to follow *(suivre)* and claim the recovery of his property from another person who holds it without any title (revindication, CC art. 5:2). The owner may file an action for an injunction on the basis of tort (CC art. 6:162) to protect him- or herself against any disturbance of the free and exclusive use of the property. This injunction either serves to prevent the recurrence of an interference or may be obtained even before an infringement has taken place. The owner may also bring an action for the reparation of damage, which in principle is awarded in the form of a sum of money, but may also be discharged by way of *restitutio in integrum* or in *natura*. In cases of unjustified enrichment, the owner may claim the payment of compensation "to the extent this is reasonable" (CC art. 6:212 (1)). See Faber and Lurger *(-Salomons)*, National Reports VI, chap. 1.2.4., 1.3., 1.6.1., 1.6.3. et seq.
64. **CZECH** CC art. 123 defines the right of ownership as the right to hold the subject of ownership, to use it, enjoy its fruits and profits, and to dispose of it (including its alienation, i.e. its transfer to another person). The owner may also damage or destroy the thing. The owner is entitled to transfer the right to use the thing *(ius utendi)*, as well as the right of possession, to another person. Due to the absolute character of ownership, the owner enjoys the right to claim the surrender of his or her property from a person withholding it unlawfully. This right is also effective in bankruptcy and execution proceedings against another person holding the property. Moreover, the owner has the right of protection from unlawful interferences, by obtaining injunctions. Under the general provision of CC art. 420, the owner is entitled to claim damages if a detriment is caused by an unlawful conduct of another person, such as the violation of an absolute right (the ownership). In cases of unjustified enrichment by an unjustified use of his or her property by another person, the owner has a claim to physical restitution of the property and the right to claim the value of the unjustified use of it. See Faber and Lurger *(-Tichý)*, National Reports VI, chap. 1.2., 2.5.2.
65. In **SLOVAKIAN** law ownership is defined as the owner's legal right to possess, use, and enjoy the subject of his or her ownership, as well as the fruits, yields and benefits derived from the property, and the legal right to dispose of it *(uti, frui, possidere, disponere)* within the limits of law. The owner is entitled to claim his or her property from any possessor who does not have a right of retention over it (*rei vindicatio*, CC art. 126 (1)). The owner also enjoys protection against anyone who unlawfully interferes with his or her right of ownership (*actio negatoria*, CC art. 126 (1)). Under Part Six of the CC, the owner may seek protection in any case of damage to his or her property and may claim restitution and recompense if a legally unjustified benefit is obtained by another person (unjust enrichment). The real owner of property in possession of another person who is subject to insolvency proceedings may file an action for separation to exclude the asset from the bankruptcy estate (Bankruptcy Act art. 78). If the asset is in the hands of another person and an execution proceeding is started against that person, the owner enjoys the right to have his property excluded from execution (Code of Execution Procedure art. 55 (1)). See Faber and Lurger *(-Petkov)*, National Reports VI, chap. 1.2.1., 1.4.1., 1.4.3.
66. Ownership is also the most comprehensive right *in rem* under **SWISS** law. It entitles the owner to possess the property, to use and enjoy it (by collecting its fruits, etc.), and to dispose of it (by alienating it, by creating limited rights *in rem* over it, by destroying or consuming it, etc.). The owner may file an action for recovery against any person who is unlawfully in possession of his or her asset (*rei vindicatio*, CC art. 641 (2)). Moreover, the owner may bring an action against any other person causing an unlawful, imminent or present interference with the property (*actio negatoria*, CC art. 641 (2)). Ownership is also protected by actions under the law of liability for damage (LOA art. 41 et seq.) and an action for unjustified enrichment (LOA art. 62 et seq.). Moreover, the owner is entitled to enforce his or her right

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in execution proceedings against another person holding the property, and to separate the property if it gets involved into insolvency proceedings against another person (Debt Enforcement and Bankruptcy Act art. 106 et seq. and 242). See Faber and Lurger *(-Foëx and Marchand)*, National Reports VI, chap. 1.2., 1.4.1. et seq.

67. In **LATVIAN** CC art. 927, ownership is defined as the full right of control over things and objects, which includes the right of possession and use, the right to obtain all possible benefits from the property, to dispose of it and to claim its return from any third person by resorting to an ownership action. The owner may resort to several legal remedies in order to protect his or her property right. The owner may prohibit all others from interfering with his or her property, as well as from using or exploiting it, even if no losses are caused to the owner (CC art. 1039). Also, the owner has the ownership action in order to recover the asset from any person who is illegally retaining the property, with the aim of having the ownership right declared and reinstated and physical control of the property restored to the owner (CC art. 1044). Moreover, the owner may claim compensation for losses which are caused by unlawful damage of property (CC art. 1779, 2354). Also, the owner has a claim arising from unjust enrichment (CC art. 2369). See Faber and Lurger *(-Klauberg and Kolomijceva)*, National Reports VI, chap. 1.2.1., 1.4.

68. **MALTESE** CC Chapter 16 defines ownership as "the right of enjoying and disposing of things in the most absolute manner, provided no use thereof is made which is prohibited by law", following the well-known maxim of *jus utendi, fruendi* and *abutendi*. The general action to recover an object is the *actio reivindicatoria*. A similar proprietary remedy is provided by the Maltese law of trusts for recovering assets which were disposed of by the trustee in a breach of trust. Maltese law usually does recognise an action for unjustified enrichment, which is considered only as an action of last resort when the ordinary remedy is, for some reason, unavailable or cannot be exercised. CC art. 1028A (1) states that "whosoever, without a just cause, enriches himself to the detriment of others shall, to the limits of such enrichment, reimburse and compensate any patrimonial loss which such other person may have suffered". See Faber and Lurger *(-Galea)*, National Reports VI, chap. 1.1., 1.5.

69. In contrast to the Roman idea of *dominium*, **ENGLISH** common law does not recognise "ownership" as absolute entitlement. The modern view of the content of the concept of ownership is that formed by *Honoré* in his essay "Ownership", and is broadly regarded as "the greatest possible interest in a thing which a mature legal system of law recognizes" (*Honoré*, Ownership, in Guest (ed), Oxford Essays in Jurisprudence, 107 at 108). In *Honoré's* view, the concept consists of a bundle of various "incidents". None of the incidents are individually necessary, although they may be together sufficient, for a person to be designated "owner" of a given thing and they may be listed as follows: the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital (including the right to destroy), the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity (ibid. at 113 et seq.). The thesis envisages that the individual incidents of ownership can be transferred from the bundle to other parties without the transferee becoming the "owner"; hence the idea that ownership equates with having the residue of rights in the thing, the incidents vesting in the "owner" once any lesser interests granted in respect of the thing terminate; see Faber and Lurger *(-Frisby and Jones)*, National Reports II, 10 et seq. English law's position on the legal possibility of abandonment seems to remain equivocal *(Frisby and Jones*, loc. cit., 140 et seq.). Under English law property rights are protected using torts rather than property law, two such torts, trespass to goods and conversion, now covering a field that was once occupied by several actions. The vindication of rights of "ownership" is achieved by means of the tort of conversion, with the claimant's right to sue being based on his right to possess. This perhaps helps to explain why, in the absence of a need to do so,

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English law has never really worked out a legal definition of ownership, concentrating instead on possession (see *Frisby and Jones*, loc. cit., 12).

70. In **IRISH** law the question of what ownership is has been much debated by jurisprudential scholars. According to *Bell* (Property Law, Chapter 4), ownership is the greatest right or bundle of rights that can exist in relation to property. Most Irish commentators define ownership in terms of what is left after lesser rights (e.g. possession under a pledge or bailment) have been granted. Thus, ownership could be said to be the residue of legal rights in an asset remaining in a person, or in persons concurrently, after specific rights over the asset have been granted to others. After all, ownership is the most basic right to enjoy and have the benefit of the property and to dispose of it. Since ownership is a right *in rem*, it survives the bankruptcy of the person against whom it is asserted (or liquidation in the case of a company), so that the asset can be held against or reclaimed from his trustee in bankruptcy (or the liquidator of the company). The common law has no equivalent of the Roman Law *vindication*, and the system of protection of property interests does not attempt to identify an individual as an "owner". In the context of protection of property rights, possession is more important than ownership. Property interests are protected through the law of torts (actions in conversion, tort, trespass or detinue). To succeed in these claims, the plaintiff must establish that he or she was in possession of the property. The main remedy at common law for the protection of personal property interests is not the return of the property to the claimant but instead, damages. See Faber and Lurger *(-Gardiner),* National Reports II, 165 et seq., 170, 172 et seq.

71. The standard **SCOTTISH** definition of ownership is that of the institutional writer Erskine: "the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction" (*Erskine,* An Institute of the Law of Scotland II. 1. 1.). Under Scottish law the owner is entitled to use, dispose of, and destroy the property. Moreover, the owner has the right to recover the property from any third party, even if that party is insolvent. In regard to the protection of ownership, the owner is entitled to vindicate that ownership against a third party who is holding the property; this remedy is named restitution. A claim is available in delict against someone who has caused the owner loss by damaging the property. The remedy here is normally damages. Furthermore, the owner may claim ex unjustified enrichment against a third party who has interfered with the property. Here the owner will be entitled to compensation for the interference. See Faber and Lurger *(-Carey Miller/Combe/Steven/Wortley),* National Reports II, 319 et seq.

72. In **CYPRIOT** law there is neither an express legal definition of ownership (except for art. 23 of the Cypriot Constitution, which provides that every person has the right to acquire, own, possess, enjoy or dispose of any movable or immovable property), nor an express and clear definition of the term in the courts' case law. The only attempt to define ownership was made in *Christou Orfanides v The Republic of Cyprus*, No 585/93. As in other common law countries, ownership can be divided in legal and equitable ownership (for further information on the concept of trust see Faber and Lurger *(-Laulhé Shaelou/Stylianou/Anastasiou),* National Reports II, 495 et seq.). The most important interest linked to the right of ownership is that it can survive the insolvency of a third party holder of the property. Other interests are the right to use, possess, destroy and dispose of the property. Under Cyprus Tort law (Chapter 148 of the Laws of Cyprus) there are three offences that may be committed against property, namely unlawful detention, conversion and unlawful interference. See Faber and Lurger *(-Laulhé Shaelou/Stylianou/Anastasiou),* National Reports II, 495, 497 et seq. For information on the restitution concept used for the reversal of unjust enrichment see *Laulhé Shaelou/Stylianou/Anastasiou*, loc. cit., 506 et seq.

73. A clue to understanding **DANISH** and **NORWEGIAN** law is to observe that rights are not qualified as "proprietary". There is no closed list of rights that may be regarded as being related to a certain asset. The existence of a right related to a movable is independent of the priority and the protection of the right. Especially in situations involving a transfer, all

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problems should be solved in a way that best suits each specific potential conflict. However, in everyday language as well as in legislation the term "owner" is frequently used, and in normal situations there is no problem identifying the owner of a thing and what that implies. In this regard, one will generally agree that the owner of a movable may use and dispose of it. Questions concerning protection are mostly not seen as issues of property law in Norway and Denmark, but as questions of criminal law, non-contractual liability law etc. The availability of a substantive claim for having the object returned, either from a thief or someone else, is seen as being so obvious that it is not even expressed in legislation. Also, it is unusual to use Roman-law based names for such claims. The functional approach applied in these countries focuses on the different rights in the movable rather than on the term "ownership". To bring a claim for recovery in Norwegian law, one needs to prove that one has a better right in the movable than the person currently holding it. In the case of insolvency of the person who is in control of the owner's asset, the debtor's creditors will have no better right in the movable than the debtor him- or herself (Deknl chap. 2 § 2). Furthermore, both in Norwegian and Danish law, physical control over a movable is protected by criminal law. In some cases, this right to protect the physical control can also be enforced against the rightful owner of the movable. For further information see Faber and Lurger *(-Færstad)*, National Reports V, chap. 3.2.1., 3.4., 5.1.

74. Opposite to many other jurisdictions there is no comprehensive civil code or property law legislation dealing with the matters of property law in **SWEDEN**. As other Scandinavian legal systems, Swedish law applies a functional transfer approach (in contrast to the Continental European unitary approach). The aim of this approach is to solve property law conflicts by a weighing of the interests considered to be relevant in the particular situation, without posing the question of who is to be regarded as the "owner". Nevertheless, for the reason of communicative simplicity the words "owner" and "ownership" are used in daily life, legislation, court cases and legal writing. However, when such terms are used in legal communication, they are used in a non-technical sense, i.e. without comprehensive "ownership rights" being connected to the word. Rather, the term "ownership" is used as a synonym for "priority" or "better right", meaning that one person is considered to have a better position in relation to another person in a specific respect. It is thereby often used to express the result of the assessment, not as an explanation or motivation to achieve specific results. Nonetheless, the general description of "ownership" does not differ that much from the Continental approach of ownership. The term "ownership" therefore describes the most complete right one can have over an object. The owner may use the property as he or she wishes as long as no restrictions follow from law or agreements that the owner has concluded. The protection of ownership is not treated as a matter of property law, but mostly as an issue pertaining to criminal law and non-contractual liability, and the protection of ownership is in fact the same as the protection of the possession (see Faber and Lurger *(-Lilja)*, National Reports V, chap. 1. and 2.5.). Neither is there a general concept of unjustified enrichment available for the "owner" where another person uses his or her property without the owner's consent. Rules on damages are often seen as a way to solve the same kind of problems (see Faber and Lurger *(-Lilja)*, National Reports V, chap. 16.).

75. There is no express regulation about the content of the right of ownership in **FINNISH** law, but Finnish legal scholars and practitioners accept that, in essence, ownership is the most comprehensive right to possess and use property and to exclude others from it. This includes a right of the owner to recover possession of the property where it is held by another person without being entitled to do so. This right is also effective where the other person is insolvent or where the property is affected by execution proceedings initiated against that person. If the property is damaged due to an intentional or careless act of a third party, the owner can seek for reparation by issuing a claim for non-contractual liability. Similar as in Sweden, a general concept of unjustified enrichment has not been developed, but the Finnish Supreme Court

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has held that anyone who has used another's property is obliged to compensate for the unjustified benefit that is the result of unlawful possession, as well as for the possible profits which the unlawful possessor has derived from, e.g., renting the object to a third party (KKO 1984 II 125). For a closer description, see Faber and Lurger *(-Kuusinen)*, National Reports V, chap. 1.2. and 1.4.

Article VIII. – 1:203: Co-ownership

Where "co-ownership" is created under this Book, this means that two or more co-owners own undivided shares in the whole goods and each co-owner can dispose of that co-owner's share by acting alone, unless otherwise provided by the parties.

Comments

A. General

1. **Function of the Article.** This Article defines the concept of "co-ownership" for the purposes of this Book; these purposes, however, being rather limited. Since general rules on co-ownership are not provided here, the only function is to provide a definition applicable to those – rare – provisions under which co-ownership is created in this Book. These provisions are VIII. – 2:305 (Transfer of goods forming part of a bulk), VIII. – 5:202 (Commingling) and VIII. – 5:203 (Combination). Taking into account the restricted role matters of co-ownership play in Book VIII, there is no need for further regulation in a definition rule; in particular, there is no need to decide which types of co-ownership to acknowledge.

2. **Comparative background.** The concepts of co-ownership in the European legal systems differ greatly. In particular, there are differences as to whether co-owners hold shares or are entitled to the whole; and with regard to the co-owners' rights to dispose of their interests. Details are reflected in the Notes on this Article.

B. The rule in detail

3. **Concept of co-ownership under this Article.** Unless the parties agree otherwise, the creation of co-ownership under this Book means that two or more co-owners own undivided shares in the whole goods and each co-owner can dispose of that co-owner's share by acting alone. All the co-owners have a right in the whole goods, not – as long as co-ownership exists – in a part of them only. For practical reasons, the type of co-ownership right adopted under this Article is such that each co-owner can freely dispose of that co-owner's right alone, without being dependent on any consent or co-operation of other co-owners.

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