European and National Property Law: Osmosis or Growing Antagonism?

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Walter van Gerven Lectures (6)
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Sixth Walter van Gerven Lecture
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Typeset in Scala and Scala Sans, Graphic design by G2K Designers, Groningen/Amsterdam


British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.
Ladies and Gentlemen,

It is with great pleasure that I have accepted the kind invitation to deliver this year's Walter van Gerven Lecture. It is truly an honour standing here, especially considering that such distinguished speakers have stood here before me.

1 Introduction

In the past, the Walter van Gerven Lectures have focused more on the institutional side of European integration than on the influence of European institutional law on substantive law, such as private law. Although the first lecture, delivered by Christiaan Timmermans, dealt with company law as *Ius Commune*, Bruno De Witte examined the national constitutional dimension of European treaty revision, Deirdre Curtin discussed the gap between the evolving EU executive and the Constitution, Gráinne De Búrca analysed the EU Constitution from the perspective of a search for Europe's international identity and, last year, Piet Eeckhout examined law and policy in the EU’s external relations in the light of the European Constitution. Of course, no one will deny that a thorough analysis of the institutional side of European integration is highly important in order to understand the integration process. It should, however, not be forgotten that the institutions of the European Union and the European Community have been created with a particular purpose and aim in mind. I refer to Article 2 of the Treaty on European Union, which states that the

“Union shall set itself the following objectives”

and then mentions as the first objective

“to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty”.

I also refer to Article 2 of the Treaty establishing the European Community, which states:

“The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of
In Article 3 a list of specific activities is given, such as, under (1) (a):

"the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect"

and under (1) (c):

"an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital."

Article 4 makes clear that the European Community is built upon the principle of an open market economy with free competition. In other words: one of the primary aims of both the European Union and the European Community is the promotion of economic prosperity. Of course, the European integration process is not limited to economic activities, but the desire to create a common and internal market is still a significant driving force. The treaty on European Union and the Treaty establishing the Economic Community create a framework for the promotion of economic activities, which German literature has called a Wirtschaftsverfassung or economic constitution. This economic constitution consists of the fundamental rights, vital to the establishment and preservation of an open market economy with free competition. As such, the economic constitution functions as the interface between the economic parameters, the rule of law, the demands of a democratic and social society as well as the protection of fundamental human rights. Without private ownership a free market economy based upon free competition is not possible. The fundamental right to private ownership plays, therefore, a dominant role in the European economic constitution.

In this Walter van Gerven lecture I will focus on the role of property law in European integration. To understand the importance of property law I will first examine the European economic constitution more in detail (2). I will then discuss existing and future European property law, with a particular emphasis on the Common Frame of Reference (CFR) (3). Subsequently, I will examine which approach towards harmonisation of property law would be more effective: a top-down approach, meaning that at a European level codes of conduct, recommendations, directives or regulations are formulated (4) or a bottom-up approach, signifying that any harmonisation attempt should start with a search for common leading principles and ground rules to establish the fonds commun upon which the new European common (property) law can be built (5). Finally, I will discuss the question how any new European property law may be received in the property law systems of the Member States: will osmosis between European and national law come into existence or will growing antagonism be the result? (6)
2 The European economic constitution and property law

The idea of a so-called “economic constitution” has in particular been developed by German authors.3 The economic constitution comprises the essential elements of a legal system from the perspective of the chosen economic model. The relevance of such a choice became very apparent during the transition stage that countries in Central and Eastern Europe had to go through as the result of the collapse of communism. The countries of Central and Eastern Europe needed a radical change of economic model within a very short period to avoid further impoverishment. This meant a change from a planned economy to a market economy and acceptance of freedom of private ownership, freedom of contract and freedom of profession and enterprise. All of these freedoms were absent under the previously existing economic model. If ever it becomes clear what the importance of an economic constitution is, it can be seen when studying the transition process in Central and Eastern Europe. What might seem self-evident for a lawyer coming from Western Europe is seen as the result of fundamental social, economic, political and legal change by lawyers from Central and Eastern Europe. During the era of communism, the economic constitution in these countries was based upon Marxism. The “means of production” were in the hands of the state, private ownership was only allowed to a very limited degree (e.g. with regard to goods for consumption). Production of goods and services was based upon central planning in accordance with multi-year plans performed by state enterprises. Freedom of contract hardly existed as contracts were seen as instruments to reach the goals set in the central economic plan. All of this had to be turned around after the fall of communism, which meant that the economic legal institutional framework had to be changed radically. A more striking example of the importance of the economic constitution underlying a legal system can hardly be provided.

The economic constitution can be defined as the ideological basis for the development of a legal system from the perspective of the chosen economic model. According to the German author Badura the definition for Wirtschaftsverfassung can be formulated as the

“grundlegenden Rechtsfragen der gegebenen Wirtschaftsordnung und der erlaubten oder geforderten Wirtschaftspolitik”.4

According to Badura the Wirtschaftsverfassung is

“der Sammelname für die Verfassungsnormen, die für die Ordnung und den Ablauf des wirtschaftlichen Prozesses wesentlich und dauerhaft maßgebend sind, hauptsächlich die Staatsziele wie das Sozialstaatsprinzip, und die Grundrechte. Normativ zugespiitzt kann von ‘der Wirtschaftsverfassung des Grundgesetzes’ in dem Sinne gesprochen werden, dass das Grundgesetz eine bestimmte prinzipielle Entscheidung über die verfassungsrechtlich gebotene Wirtschaftsordnung getroffen hätte, mit
The essential elements of the economic constitution underlying the European Union and the European Community can be described as follows.

First of all, everyone is free to choose a profession or start an enterprise. Within the European Union and the European Community this freedom is indirectly guaranteed through the acceptance of free movement of goods, persons, services and capital.

A second characteristic is the protection of ownership. In Europe this protection is given at a double level. It can be found in both the EC Treaty as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Firstly, at the level of the European Community in Article 295 EC stating:

“This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.”

Article 295 EC thus guarantees non-interference with national property law. As will be seen later, the ambit of this article is however far more restricted than one would be inclined to infer at first sight. Secondly, ownership is protected by Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The protection given by Article 1 of the First Protocol is very broad, due to the extensive interpretation of “possessions”. This article protects both the subjective right to ownership as well as the institution of ownership. Article 17 of the Charter of Fundamental Rights of the European Union and the corresponding Article II-77 of the Treaty establishing a Constitution for Europe reaffirm the protection of ownership at an EU level. I will call this guarantee the “freedom of ownership”.

The third element of the economic constitution is the freedom of contract and the freedom for entrepreneurs to take their own (market) decisions. This is an expression of the more general freedom of every person to make its own choices. All these freedoms are, of course, not without limits, but they function as sign posts with regard to the economic structure underlying property law.
Restating the above it can be said with certainty that “freedom of ownership” is one of the pillars of the economic constitution of the European Union and the European Community. However, this freedom is not unlimited. It is a freedom bound by the economic integration process and the aim to reach a common and internal market. Diverging national rules on property law may prove to be such an obstacle to this process that harmonisation or even unification of these rules might have to be considered. Until recently, such consideration was seen as rather useless in the light of the existing divergence between the property law traditions in Europe. Especially the differences between common law and civil law were seen as almost unbridgeable. Under the pressure of economic integration, however, harmonisation of property law is more and more considered to be unavoidable. Integration of capital markets, to give but one illustration, will not be completely possible if the legal instruments used by, for instance, banks to secure repayment of a loan still differ from country to country. Let me give an example. A German bank, when lending money to a Belgian client to buy a house in Spain, may demand from her Belgian customer a (second) mortgage on the client’s house in Belgium and a first mortgage on the house in Spain. For the German bank this means that legal advice is needed in Belgium and Spain, as under generally accepted rules of private international law (lex rei sitae) Belgian law will govern the mortgage in Belgium and Spanish law will govern the mortgage in Spain. The German bank will lack sufficient knowledge of Belgian and Spanish mortgage law and will therefore request advice from local experts, such as notaries. As a consequence transaction costs will rise. Eliminating these legal divergences through a harmonisation of mortgage law, would reduce transaction costs and thus be favourable for banks and their clients. At the moment, these transaction costs are an obstacle to a fully integrated mortgage market.

3 Existing and future European property law

(a) Primary European law

It is debated in legal literature whether primary European law, has a direct impact on property law. The following articles of the EC Treaty are often mentioned: Articles 28 and 29 EC, declaring that quantitative restrictions on imports or exports and all measures having equivalent effect shall be prohibited between Member States, and Article 56 EC, stating that within the framework of the provisions set out in chapter 4 on capital and payments, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. If property law is to be affected by Article 28 EC, it will have to be argued that property rights are products, which can be exported and imported. So far, the European Court of Justice has not gone in that direction. With regard to Article 56 EC, however,
the Court did accept that freedom of capital could affect a Member State’s property law. This can be seen in the *Trummer v Mayer* case. The facts in this case are as follows. By an agreement, dated 14 November 1995, Mr. Mayer, residing in Germany, sold to Mr. Trummer, residing in Austria, a share in the ownership of a property situated at Sankt Stefan im Rosenthal, Austria, for a sum denominated in German marks. Under the same agreement, Mr. Mayer allowed Mr. Trummer to settle the purchase price by 31 December 2000 at the latest and waived the provision of a value guarantee and the payment of interest. The parties agreed, however, that a mortgage should be created to secure payment of the purchase price. The amount of the loan in the mortgage deed was expressed in German Marks and not in Austrian Schillings. Austrian law prohibited the registration in a foreign currency of a mortgage securing such a debt. Did this prohibition violate the freedom of capital movement? The Court ruled that a mortgage of the kind at issue here is inextricably linked to a capital movement, in the present case, the liquidation of an investment in real property. Given this inextricable link, the Austrian rule prohibiting the registration in a foreign currency violated the freedom of capital. It can, of course, be argued that this decision only affects certain limited aspects of land registration. Nevertheless, the decision also shows that the freedom of capital may have an impact on property law.

(b) Secondary European law

Until the last two decades, secondary European law did not affect property law directly. This has now changed. Three directives and one regulation can be mentioned. In Council Directive 93/7/EEC on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, the Member States are obliged to return such cultural objects in accordance with the procedure and in the circumstances provided for in that directive. The directive obliges Member States to use extended prescription periods with regard to cultural objects from public collections and ecclesiastical goods. The Late Payments Directive (Directive 2000/35/EC, Article 4) and the Insolvency Regulation (Council Regulation (EC) No 1346/2000, Article 7) provide rules with regard to retention of title clauses. Finally, a directive must be mentioned that had a direct impact on the property law systems of the Member States: the Financial Collateral Directive (2002/47/EC). The latter directive’s aim is to harmonise the law on financial collateral arrangements, meaning a title transfer financial collateral arrangement or a security financial collateral arrangement. A title transfer financial collateral arrangement is an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations. A security financial collateral arrangement is an arrangement under which a collateral provider provides financial collateral by way of security in favour of, or to, a
collateral taker, and where the full ownership of the financial collateral remains with the collateral provider when the security right is established. It will be apparent from the above that the various European legislative measures in the area of property law are not part of a coherent structure and show a fragmented approach, as can be seen in other areas of European private law.

(c) Future secondary European property law

As to future secondary European property law the picture is almost as fragmented as we saw concerning already existing European property law. Several Directorates General are working on various projects concerning harmonisation of property law.

The Directorate General Internal Market and Services is preparing the introduction of a new uniform type of a non-accessory (i.e. not dependent upon the existence of an underlying debt) European mortgage on immovables, essentially based upon German and Swiss mortgage law. In this area already some acquis communautaire exists: a code of conduct, which covers consumer information for domestic and cross-border home loans. The purpose of this code is to guarantee that consumers receive transparent and comparable information on housing loans in order to encourage cross-border competition.

Connected with the attempt to harmonise mortgage law are the attempts to provide better cross-border access to information contained in land registries. Reference can be made to the EULIS (European Land Information Service) project, which, according to the Commission’s Green Paper on Mortgage Credit in the EU, was funded by the European Commission and is now to be continued. EULIS will provide access to core information in land registries for each participating country. The information includes a basic description of legal concepts, a description of routines and effects of registration of real property conveyance and mortgaging, as well as contact information concerning authorities involved in real property transactions. Access to real property data is provided on the basis of property-id (cadastral unit) or address of the property. Headers in the register output will be presented in English. The land information is presented in the national language.

Under the responsibility of the Directorate Health and Consumer Protection the time-share directive undergoes a process of review. Although the present directive only affects the contractual aspects of time-share arrangements, the concept of a time-share without any doubt belongs to property law: it leads to a fragmentation of ownership by splitting up ownership rights into being the “owner” for a limited, periodically returning, period. It will be quite interesting to see, whether property law aspects of time-share arrangements will be considered in the revision process.

It should further be mentioned that the Committee on Legal Affairs of the European Parliament has appointed three experts, who had to prepare a hearing on the concept of the trust in common law jurisdictions as part of the consultative process regarding the Green Paper on Wills and Succession.
this green paper a broad-based consultation process is opened on intestate and
testate succession with an international dimension. Although the green paper
mainly deals with private international law, it has raised questions with regard
to recognition of common law trusts in civil law jurisdictions. The common law
trust is characterised by fragmented ownership: both the trustee/manager and
the beneficiary are owner of the trust property, but each has its own owner-
ship rights. The trustee owns the property to manage it. The beneficiary owns
the property with regard to the benefits. The trust mechanism is frequently
used in common law jurisdictions to divide an estate between, to give but one
example, a surviving spouse and the children. Such a fragmented ownership is
difficult to reconcile with the traditional civil law approach, which only accepts
unitary ownership. The recognition of a common law trust in a civil law system
therefore requires a certain amount of adaptation. A hearing was held on 3 May
2006.\textsuperscript{24} In the final report on the green paper the European Parliament referred
to Article 295 EC to make clear that trust law belongs to property law and hence
does not fall under the competence of the European Community, but did point
out that trust law might interfere with the law applicable to a succession.\textsuperscript{25}
As far as I understand the Recommendation, this would mean that civil law
jurisdictions still would have to recognise common law trusts, applying the law
that is applicable to the trust. Recognition would, however, imply acceptance of
fragmented ownership, also with regard to trust property situated in the respec-
tive civil law jurisdiction. It will be very interesting to watch the developments
concerning the harmonisation of private international law in this area.

(d) The Common Frame of Reference as a “toolbox”
for future European property law

One of the major attempts to streamline existing and future
property law is the Common Frame of Reference (CFR), a project meant to
restructure existing European private law and to be a “toolbox” for future
European private law. This project falls under the responsibility of the Direc-
torate General Health and Consumer Protection. Although the CFR’s main
focus is on contract law, a study conducted by von Bar and Drobnig shows that
harmonisation of contract law inevitably must lead to harmonisation of certain
parts of the law of property.\textsuperscript{26} In France and Belgium, to give but one example, a
sales agreement results in an immediate transfer of ownership. Both countries
follow the so-called consensual transfer system. Such property consequences of
a sales agreement cannot but influence the rules with regard to the formation of
contracts.

The structure of the CFR, as originally proposed, includes assignment of
claims, personal security rights, security rights in movables, transfer of title in
movables, related matters in property law (it is as yet unclear what these matters
might be): perhaps trusts could be added. At this moment a debate is going
on as to whether these aspects of property law should still be included in the
CFR. On 21 November 2006, the author attended a public hearing which had been convened by the Committee of Legal Affairs of the European Parliament. The hearing concerned the future of the CFR. It was stated by the Member of European Parliament Lehne that no decision had yet been taken by either the European Commission, the European Parliament or the Council of Ministers not to include property law in the CFR.\(^{57}\)

In my view, it may prove to be very difficult, not to say impossible, to exclude property law from the CFR, given the already existing law and the work on future European property law. The CFR would not give an adequate and full overview of even the consumer law acquis and it would not provide a tool box to facilitate law-making for the EU institutions, if it would not also include at least some aspects of property law as mentioned above. Fortunately, three members from the Legal Affairs Committee of the European Parliament have established a special working group on the CFR. I am convinced that the involvement of the European Parliament in this project will prove to be beneficial. A CFR, whatever its status (binding instrument, whether in an opt-in or an opt-out version, non-binding instrument, interinstitutional agreement) is bound to have a profound and lasting impact on the development of European private law generally and also, more specifically, on European property law. For that reason alone the final result of such a project must have gone through a process of political decision making by a democratically elected legislative body.

A wholly different question is, whether an overall legislative project, such as the CFR, is the best approach towards the establishment of a common and internal market. It is a typical example of a top-down approach. At the European level choices are made as to which solutions are the “best” to be further developed as European private law. Why not take the opposite approach, advocated in the United States by Brandeis, J. in his dissent in *New State Ice Co. v Liebmann* that the states might act as laboratories to find out what might be the most efficient and most effective solution for other states?\(^{28}\) In other words: why not accept competition between the various national legal systems? Would it not be far better for the acceptance of harmonised or unified rules if these were based upon a bottom-up approach instead of a top-down approach? Before answering these questions I would briefly like to discuss whether the European Community and the European Union have any competence to create a fully binding Common Frame of Reference in the area of property law. If not, a top-down approach would already fail merely on this ground.

### 4 Top-down harmonisation of property law: competence and policy

The question whether property law should be harmonised must be clearly distinguished from the question how this could be done: “top-down” or “bottom-up”. The “top-down” approach means that the European Union and
the European Community use the well-known legislative forms of a directive or a regulation to force Member States to change their national laws or, less compelling, use a non-binding recommendation. A possible legal ground for harmonisation of property law might be Article 95 EC. In order to use Article 95 EC as a legal basis, the legislator must argue that the measure is necessary to attain the establishment and functioning of the internal market, but this should be more than an incantation. The ECJ has made this abundantly clear in its Tobacco judgment. Article 95 EC does not vest in the Community legislature a general power to regulate the internal market. Furthermore, Community action must not violate the subsidiarity principle as laid down in Article 5 EC, Article 2 TEU and Protocol 30 to the EC Treaty on the application of the principles of subsidiarity and proportionality. According to Article 5 EC the Community shall take action in areas which do not fall within its exclusive competence, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. This overall limitation also applies to the form of the legislative measure to be chosen, as the form of community action “shall be as simple as possible”. To me it seems that Article 95 can only be the basis for harmonisation of certain specific areas of property law. It cannot be argued that the whole area of property law must be harmonised to achieve the objective of progressively establishing an internal market, as this would in fact mean that the European Community had a general power to regulate the internal market. The ECJ stated clearly in the Tobacco judgment that such a general power does not exist. Only sectoral, not general, top-down harmonisation will be possible.

Finally, also Article 295 EC should be taken into consideration. This article states, as we already saw, that the EC Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. Although at first sight it seems that Article 295 has a large ambit, its effect has been limited in case-law developed by the ECJ. Reference can be made to the so-called “Golden Shares” cases. In these cases the Court had to decide on the compatibility with community law of “national systems which grant the executive certain prerogatives to intervene in the share structure and in the management of privatised enterprises in strategically important areas of the economy.” The Court ruled that Article 295 EC

“merely signifies that each Member State may organise as it thinks fit the system of ownership of undertakings whilst at the same time respecting the fundamental freedoms enshrined in the Treaty.”
Article 295 EC does not mean that property law cannot be touched at all by European law.\textsuperscript{37} A wholly different matter is, whether property law should be harmonised in the first place. This is a question of legal policy. Is there really a need to harmonise? Looking at the existing European property law and the various projects going on, it seems to me that it can safely be said that harmonisation in areas which directly affect cross-border business dealings is perceived to be useful. Examples are security interests with regard to movables and claims as well as mortgages on immovables. The difficulty here is that harmonisation of these areas cannot be undertaken without looking also at the whole fabric of property law and the interaction between property law and the law of obligations, especially contract law. The creation of a security interest or the establishment of a mortgage is in several legal systems closely linked to the general rules on transfer of movables, claims and immovables. A new rule concerning the creation of, for instance, a security interest might thus upset general rules on transfer and risks to create tensions in the national property law system. To avoid that necessary harmonisation creates such tensions a top-down harmonisation should be prepared and accompanied by a bottom-up approach. Such a bottom-up approach will pave the way towards well considered sectoral harmonisation of property law and might even lead to spontaneous, albeit more gradual, harmonisation.

5 The bottom-up approach: a search for thought patterns

Preparing a bottom-up approach requires intensive and thorough analysis of the various property law traditions in Europe.\textsuperscript{38} Special and careful attention will have to be paid to the differences between common law and civil law. It will be necessary to investigate these traditions while looking under the surface of diverging technical rules of law. By using a historical-comparative analysis the differences between common and civil law can be better understood. The basic structure of a property law system (and this applies to both the common law as well as the civil law tradition) is frequently the combined result of historical developments, the needs of legal practice, case law and academic legal analysis. In spite of all the differences between the national property law systems, such historical-comparative “under the surface” analysis will show that it will certainly be possible to find common thought patterns. Once when these common thought patterns have been found, harmonisation measures should take these into account in order to avoid unnecessary friction in the national legal systems.

When looking for such common thought patterns a distinction should be made between leading principles, ground rules and technical rules. In my view leading principles of property law are the filters through which a legal relationship must pass, before it can be characterised as a property right.\textsuperscript{39} These filters
separate personal rights (such as contractual rights) from property rights (rights against the world with \textit{erga omnes} effect) and focus on the external aspects – the effects towards third parties – of rights. Ground rules describe the consequences of a right after it has been established that it has the character of a property right. Finally, technical rules provide in more detail how property rights function and are more of a detailed nature (e.g. the requirement of a notarial deed in case of transfer of land). I will focus on the leading principles and the ground rules.

(a) Leading principles

The leading principles of property law are the principle of \textit{numerus clausus} (i) and the principle of transparency (ii).\textsuperscript{40}

(i) According to the \textit{numerus clausus} principle the content and number of property rights is limited, given the effect of these rights vis-à-vis third parties. Property rights are “rights against the world” or, in other words, have \textit{erga omnes} effect and give the holder of these rights far more power than for instance a right arising from a contract. As a consequence legal systems are careful not to accept property rights too easily and therefore limit their number and content. In some legal systems this limitation is stronger than in others, but it can be found in both common as well as civil law, although it has been more theoretically developed in civil law systems. An example from the common law is the limitation of estates at law in Section 1 of the English Law of Property Act 1925. A clear example of a legal system that, at least in theory, strictly adheres to the \textit{numerus clausus} principle is German law. What can be seen, however, when further examining German law (and the same applies to French law) is that courts have accepted property rights outside the official legislative list. Examples under German law are the acceptance of Anwartschaftsrechte (expectation rights), the \textit{Treuhand} (civil law trust) and the right arising as a result of a \textit{Vormerkung} (preliminary registration of a deed relating to a land transaction).\textsuperscript{41} The nature of these three rights is debated in German literature, but it cannot be denied that in all three cases the person having an Anwartschaftsrecht (e.g. the buyer under a retention of title sale), the Treugeber (e.g. someone depositing money in a trust account) and the buyer of land all have rights vis-à-vis third parties of such a nature and of such a strength that these rights can be qualified as property rights. Under French law the \textit{Cour de Cassation} decided in an old case, that the definition of ownership in the French Civil Code is merely descriptif, but not prohibitif, meaning that parties have the freedom to fragment ownership and thus create new property rights.\textsuperscript{42} I do realise that this case is fairly old, but it still is a classical case in French property law and it makes it better understandable why in France legislation that will introduce a civil law trust (fiducie) is again seriously considered.\textsuperscript{43}

(ii) The second principle I mentioned above is the principle of transparency. This principle has two aspects: given the nature and effect of property
rights as rights against the world, others must be able to know about these rights, because of their binding nature. Information is therefore a vital aspect of a property right. It is interesting to see that, with regard to immovables and certain movables of high value, publication almost always means registration in a public register. This can be observed with regard to land, but also concerning ships and aircraft and in the future, but only limited, to security interests and mobile equipment such as railway rolling stock. With regard to movables the information is given by possession, concerning claims frequently information on for instance a transfer must be given to the claim's debtor. Remarkably enough, the role of possession as information carrier is diminishing in the light of the enormous importance of possession transfers, which are effected by mutual agreement (such as transfer of possession by constitutum possessorium in a situation where the seller will remain in control of the movables after the transfer to the buyer). The role of possession is further diminishing as a consequence of the rise of non-possessory security interests, such as the non-possessory pledge in the Netherlands, the transfer of ownership for security purposes in Germany and the financial collateral arrangement under the European Financial Collateral Directive. Concerning claims, particularly in case of a bulk transfer or the creation of a bulk security interest, more and more legal systems do not require that information is given to the debtor of the claim. The requirement to inform all the debtors of a bulk transfer would make such a transaction highly expensive and the debtors may still pay their debt to the original creditor. This development is going so far that in German legal literature the question has been raised whether, on the one hand, land law and the law of high value movables and, on the other hand, the law of low value movables and claims should perhaps be treated as two separate legal areas. For a common lawyer this might not seem to be such a drastic change, as in a common law system the law of property does not have a unified structure. Common lawyers still make a difference between land law, personal property law and trust law. For a civil lawyer this is very different. It was one of the great achievements of the civil law codifications after the French Revolution that the existing fragmentation was replaced by a system of property law with general principles and rules, which would apply to all forms of property: immovables, movables and claims. In fact, if such a distinction between objects with high value and objects with low value would be made in the civil law, this would bring common and civil law closer together at a more structural level.

The above brief analysis of the two leading principles of property law shows, first of all, that what was discussed are, indeed, principles and not rules, as they shed light on when a right can be qualified as a property right, without giving a decisive answer. Secondly, it shows that the criticism – often heard, but never really substantiated – by civil property lawyers that the common law of property is fragmented, unsystematic and therefore not a suitable model for a possible European property law needs to be reconsidered. The same is true of the criticism by common property lawyers that the civil law is far too theoreti-
cal to be workable in practice. The above analysis shows that civil and common law, at least at the level of principles, show more common ground than might be thought at first sight.

(b) Ground rules

Once it has been established that a right can be fitted into the *numerus clausus* of property rights and is transparent enough towards third parties for it to be justified that these third parties are *nolens volens* bound by it, the ground rules of property law apply. These ground rules concern the further consequences of the conclusion that the right in question is a property right and focus on how property rights relate among themselves. In Europe, these ground rules are the following: the *nemo dat* (or *nemo plus*) rule (i), the *prior tempore* rule (ii), limited rights have priority over fuller rights (iii), protection rules such as the right to (re)claim the object of the property right (iv).

(i) According to the *nemo dat* rule, one cannot give away more than one has. A transfer of the right of ownership, to give an example, is only effective if the transferor has the power to dispose, because he or she is the owner. This is a highly logical ground rule. It would be unacceptable if one were able to alienate the property rights of others, which would violate the absolute nature of such a property right. Of course, the *nemo dat* rule is counterbalanced by rules on third party protection. A third party in good faith, who paid for the right, is frequently protected against the original owner, who claims his right of ownership. A major reason for such an exception can be that in day-to-day business a buyer should be allowed to rely, if justified, on the outward appearance that a seller is also the owner, to safeguard ordinary commercial dealings. If the original owner could always reclaim the right of ownership, this could jeopardize commerce and would affect various third parties in good faith.

(ii) If various persons claim property rights with regard to an object, the oldest property right has priority over a younger property right: *prior tempore, potior iure*. This ground rule is connected, first of all, with the absolute nature of the pre-existing property right. A property right can only be impaired by a new property right if the holder of the existing property right is a party to the creation of the new property right. If not, the absolute nature of the pre-existing property right protects the holder of such a property right against later property rights. This explains, for instance, why a mortgage which was created after another mortgage had already been created, ranks second and its holder will only be entitled to the proceeds of any public auction after the first mortgagor has been fully paid.

(iii) Nevertheless, if a new property right has been created with the consent of the holder of the first property right, such a second right will limit the first right. In such a case the first right holder (sometimes in civil law terminology called the holder of the “mother right”) then must accept that the holder of the second property right has a stronger position and can enforce its right (the
“daughter right”) against the mother right, although the “daughter right” is younger than the “mother right”. For that reason, a right of mortgage is stronger than the right of ownership which is burdened by the right of mortgage.

(iv) Finally, the fourth ground rule is that, once a property right has been accepted as such it is given special protection. This could be with a special remedy, such as revindication (the owner can claim the object of the right of ownership from any person who has such object under his control), or with the help of claims based upon tort. It could be contended that some circularity of reasoning may be detected here, because it could be argued that whenever a right is given special protection through for instance a revindication claim, such a right must be a property right. In my view this is incorrect. If a special claim is given to a right holder or if such right holder is given a protected status in insolvency proceedings, allowing him or her to separate the object of the right from the insolvent estate, this means that it must have been decided previously that the right to be protected is a property right.

6 European and national property law: osmosis or growing antagonism?

It should not be forgotten that the European Union and the European Community were created with a particular aim: the establishment of a common and internal market. The various institutions were, originally, set up with that particular aim in mind. To establish and preserve this common and internal market the European treaties provide a framework for economic activities: the European economic constitution. An essential part of this economic constitution is freedom of ownership. Freedom of ownership should be interpreted broadly and be seen as freedom of property rights, especially in the light of the case law developed by the European Court of Human Rights in Strasbourg.

The protection of ownership in the European economic constitution does not mean that rules of property law are immune to harmonisation, if such rules create an obstacle to the establishment of the common and internal market. In order to find out which areas of property law should be harmonised and what would be the best way to proceed two approaches have been examined: the top-down approach and the bottom-up approach. I hope to have shown that the bottom-up approach should precede the top-down approach.

A bottom-up approach makes it possible to discern what the various property law systems in Europe have in common. These common features are, as we have seen, of a fairly abstract nature and can be divided into leading principles, ground rules and technical rules. Underlying these principles and rules are policy choices, such as the protection of commerce above protection of the original owner. The diverging technical rules are the greatest difficulty here, as due to their technical complexity they sometimes make it very hard to understand
what is happening in a particular legal system “under the surface”. It is this last approach that is vital to tracking the common features. A major problem for such an in-depth analysis is the desire of property lawyers to adhere to chosen definitions to such a degree that they get trapped in their own legal constructions and need a more metajuridical view to escape from that trap. Historical-comparative legal analysis offers such a metajuridical view. Essentially, property law is about rights that people claim with regard to objects. These objects can be things (Sachen), but also personal rights or ideas. The most extensive right a person can claim is “ownership” or “full entitlement”. What constitutes “ownership” or “full entitlement” is a purely dogmatic question, based upon an \textit{a priori} chosen definition. If the definition is limited to corporeal things (as in Germany and the Netherlands) you cannot “own” rights, but rights “belong” to you. Does it really matter? You can transfer rights, pledge them, create a right of usufruct on these rights. To me the whole debate on whether rights can be “owned” is a trap, created by pandectist legal thinking. We are the prisoners of definitions we have formulated ourselves. Some legal realism might be helpful here and to me legal realism in this area of the law means that what counts is the content of your right: if the content of “owning” or “belonging” is the same with regard to things and rights (and in my view it is: transferability, creation of a security right, usufruct), why make a – wholly unnecessary – distinction? Is not this what Ockham’s razor – to put it briefly: that one should select the least complicated theory that presents an explanation – is all about? If European property law is founded upon the aforementioned common features (leading principles and ground rules), thus creating awareness of the various underlying common thought patterns, the result will be that European property law is not perceived as a \textit{corpus alienum}, but as law that can be received and accepted as a further development of the existing national property law. The result will then be a growing osmosis between national and European property law.

However, a top-down approach, not based upon thorough research of the national property law traditions in the European Union, is bound to lead to growing antagonism between national and European property law. If the European rules are too much common law based, frictions with civil law systems will occur and vice versa. If the rules are too much the result of lobbying by a particular interest group different interest groups at a national level may consider these European measures as an unacceptable interference with national property law. During my work as an advisor in Central and Eastern Europe I once heard a representative from the banking industry say that if the national parliament in a particular country would not legislate as the banking industry wanted they would lobby for a solution at the European level to bypass that national parliament. It will not surprise any of you that, after such a threat, not only national politicians will start to revolt against Europe, but also other national interest groups as well as national lawyers working in this area. This is the top-down approach, which creates antagonism.
To me, therefore, the answer to the question what can be observed with regard to European and national property law – osmosis or growing antagonism – is that both can be seen. To promote osmosis and avoid growing antagonism it is submitted that a combined bottom-up / top-down approach will be a conditio sine qua non. Based upon a thorough analysis of the national legal systems, a European model could be developed that should have a non-binding nature and could act as an extra jurisdiction next to the legal systems of the Member States. The European model could then prove itself in competition with the existing national law.\(^{46}\) In this way, it will become clear “bottom-up” how far – in the famous words of the late Lord Denning, M.R. in the case of *Bulmer v Bollinger* – the “incoming tide” of European law will come.\(^{47}\)

The expression “incoming tide” makes me think of the famous book *Der Schimmelreiter* by the well-known author (and lawyer!) Theodor Storm, published in May 1888 shortly before his death. One of the leading themes in the book is the immense fear of rising water and the urge to protect oneself against this by building and maintaining dykes. At some moment, the main character of the book, the dykemaster (*Deichgraf*) Hauke Haien, rides on his horse with his little girl along the dykes and the following conversation ensues:\(^{48}\)

“Es war Hochflut; als sie auf den Deich hinauskamen, schlug der Widerschein der Sonne von dem weiten Wasser ihr in die Augen, ein Wirbelwind trieb die Wellen strudelnd in die Höhe, und neue kamen heran und schlugen klatschend gegen den Strand; da klammerte sie ihre Händchen angstvoll um die Faust ihres Vaters; die den Zügel führte, dass der Schimmel mit einem Satz zur Seite fuhr. Die blassblauen Augen sahen in wirrem Schreck zu Hauke auf: ‘Das Wasser, Vater! das Wasser!’ rief sie. Aber er löste sich sanft und sagte: ‘Still, Kind, du bist bei deinem Vater; das Wasser tut dir nichts!’”

The rising water is for the child what to most national property lawyers is the incoming tide of European law. It creates fear and is sometimes even being denied. The dykemaster is the European private lawyer, who tries to analyse where the water should be free to go and where it should be stopped by building a solid dyke. A challenging task!
Notes
The hyperlinks mentioned in the notes have also been reproduced on the website of Leuven CCLE in order to allow fast navigation (www.ccle.eu). All URLs have been verified in November 2006.

5 Idem, p. 10.
6 Article III-145 Treaty establishing a Constitution for Europe (hereinafter: Constitutional Treaty). As is well known, this treaty has not entered into force.
8 See for German law: Article 14 of the German Constitution, and P. Badura (cf. supra, note 3) p. 29 ff., especially p. 31.
9 Article II-77 Constitutional Treaty reads as follows: “(1.) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest. (2.) Intellectual property shall be protected.”
8. It should also be borne in mind that, in accordance with the case-law beginning with Cassis de Dijon (Case 120/78 Rewe-Zentral v Bundesmonopolverwaltung für Branntwein [1979] ECR 649), in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30, even if those rules apply without distinction to all products,
unless their application can be justified by a public-interest objective taking precedence over the free movement of goods (Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraph 15).

9. By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (Keck and Mithouard, paragraph 16)."

In the light of these considerations it can be argued that legal rules, such as property rights, are not by itself seen as “products” to which Article 28 EC applies. A different view would have an enormous impact on the national rules of private international law. It would mean that, to give but one example, Member States would have to accept any foreign security interest, if such interest had validly come into existence under the law of another Member State. Cf. J.Th. Füller (cf. supra, footnote 11) p. 4.

It could, nevertheless, be argued that the series of ECJ cases on recognition of foreign companies as a consequence of the freedom of establishment might be a counterargument against the above interpretation of the Familiapress case. In this line of cases no longer the acceptance of “products” is the heart of the matter, but the acceptance of legal persons, in other words: a construction created by law.

Within the framework of this lecture I do not have the time to analyse this point further. The cases are: ECJ 27 September 1988, Case 81/87 The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.; ECJ 9 March 1999, Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen; ECJ 5 November 2002, Case C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC); ECJ 30 September 2003, Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.

12 ECJ 16 March 1999, Case C-222/97 Manfred Trummer v Peter Mayer.

13 In the Court’s own words: “26. The effect of national rules such as those at issue in the main proceedings is to weaken the link between the debt to be secured, payable in the currency of another Member State, and the mortgage, whose value may, as a result of subsequent currency exchange fluctuations, come to be lower than that of the debt to be secured. This can only reduce the effectiveness of such a security, and thus its attractiveness. Consequently, those rules are liable to dissuade the parties concerned from denominating a debt in the currency of another Member State, and may thus deprive them of a right which constitutes a component element of the free movement of capital and payments (see, in relation to Article 106(1) of the EEC Treaty, Joined Cases 286/82 and 26/83 Luisi and Carbone v Ministero del Tesoro [1984] ECR 377, paragraph 28, and Case 308/86 Lambert [1988] ECR 4369, paragraph 16).

27. Furthermore, the rules at issue may well cause the contracting parties to incur additional costs, by requiring them, purely for the purposes of registering the mortgage, to value the debt in the national currency and, as the case may be, formally to record that currency conversion.

28. In those circumstances, an obligation to have recourse to the national currency for the purposes of creating a mortgage must be regarded, in principle, as a restriction on the movement of capital within the meaning of Article 73b of the Treaty.

29. The Finnish Government submits, however, that the free movement of capital is not an absolute principle and that the national rules at issue in the main proceedings are designed to ensure the foreseeable and transparency of the mortgage system, which constitutes an overriding factor serving the public interest, and is such as to justify the rules in question.
30. It should be noted that a Member State is entitled to take the necessary measures to ensure that the mortgage system clearly and transparently prescribes the respective rights of mortgagees inter se, as well as the rights of mortgagees as a whole vis-à-vis other creditors. Since the mortgage system is governed by the law of the State in which the mortgaged property is located, it is the law of that State which determines the means by which the attainment of that objective is to be ensured.

31. Neither the Austrian Government nor the parties to the main proceedings have submitted observations to the Court. But even assuming that rules such as those in issue are in fact designed to attain that objective, it appears that those rules enable lower-ranking creditors to establish the precise amount of prior-ranking debts, and thus to assess the value of the security offered to them, only at the price of a lack of security for creditors whose debts are denominated in foreign currencies.

32. In addition, national rules such as those at issue in the main proceedings contain an element of uncertainty which may compromise the attainment of the objective described above. As stated in paragraph 5 of this judgment, the Austrian rules allow the value of the mortgage to be expressed by reference to the price of fine gold. Yet, as the Advocate General observes in point 14 of his Opinion, the price of gold is currently subject to fluctuations in the same way as the value of a foreign currency."


18 Reference can be made to the work done by the Mortgage Credit Forum Group, the Green Paper on Mortgage Credit in the EU (COM/2005/0327 final), the Mortgage credit costs and benefits study and the comments made by Member States of the EU and the EEA, corporate entities (banks), a considerable number of representative bodies, European institutions and others. Furthermore, a very well attended public hearing was held. I refer to the information that can be found on: http://ec.europa.eu/internal_market/finservices-retail/home-loans/integration_en.htm. See also the Resolution adopted by the European Parliament on 14 November 2006, to be found at: http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2006-0487&language=EN.


24 The text of the presentations can be found at: http://www.europarl.europa.eu/comparl/juri/hearings/default_en.htm.


“The European Parliament points out that the rules on property ownership come under the competence of the Member States, pursuant to Article 295 of the Treaty, and therefore requests that the legislative act to be adopted should not apply to trusts. However, that instrument should specify that when a trust is created as a result of death, the fact that the law specified by the instrument in question applies to the succession does not prevent another law from being applicable to management of the trust and that, by the same token, the fact that the law governing the trust applies to it should not prevent the law governing the succession by virtue of the future legislative act from being applicable to it.”


28 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932). In his own words: “To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.” (footnote omitted)

29 See Article 249 EC.


31 ECJ 5 October 2000, Case C-376/98 Federal Republic of Germany v European Parliament and Council of the European Union. See also ECJ 10 December 2002, Case C-491/01 The Queen and Secretary of State for Health, ex parte: British American Tobacco (Investments) Ltd v Imperial Tobacco Ltd.
The relevant part of the judgment is as follows: “81 Article 100a(t) of the Treaty empowers the Council, acting in accordance with the procedure referred to in Article 189b (now, after amendment, Article 251 EC) and after consulting the Economic and Social Committee, to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

82. Under Article 3(c) of the EC Treaty (now, after amendment, Article 3(1)(c) EC), the internal market is characterised by the abolition, as between Member States, of all obstacles to the free movement of goods, persons, services and capital. Article 7a of the EC Treaty (now, after amendment, Article 14 EC), which provides for the measures to be taken with a view to establishing the internal market, states in paragraph 2 that that market is to comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.

83. Those provisions, read together, make it clear that the measures referred to in Article 100a(t) of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.

84. Moreover, a measure adopted on the basis of Article 100a of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it by Article 164 of the EC Treaty (now Article 220 EC) of ensuring that the law is observed in the interpretation and application of the Treaty.

85. So, in considering whether Article 100a was the proper legal basis, the Court must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature (see, in particular, Spain v Council, cited above, paragraphs 25 to 41, and Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405, paragraphs 10 to 21).”

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34 Opinion by Advocate-General M. Dámaso Ruiz-Jarabo Colomer, under 1.
35 Case 367/98, recital 28.
36 On the interpretation of Article 295 see also the Opinion by Advocate-General M. Dámaso Ruiz-Jarabo Colomer, under 19 ff.


42 See the Convention on interests in mobile equipment (Cape Town, 2001), to be found on the website of Unidroit: http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.


44 In H.P. Bulmer ltd. and another v J. Bollinger S.A. and others, Court of Appeal 22 May 1974 [1974] Ch. 401. Lord Denning, M.R. discussed the enormous impact of the EEC Treaty on English law. He said: “The first and fundamental point is that the Treaty concerns only those matters which have a European element, that is to say, matters which affect people or property in the nine countries of the common market besides ourselves. The Treaty does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.” See also I. Freeman, Lord Denning. A Life (London: Arrow books, 1994) p. 369 ff.

The Leuven Centre for a Common Law of Europe

Mission Statement
Further information on Leuven CCLE is available at:

www.ccle.eu
The objective of the Leuven Centre for a Common Law of Europe (Leuven CCLE) is to focus research efforts of the Faculty of Law of the Katholieke Universiteit Leuven (K.U.Leuven) on legal developments that are common to the whole of Europe. A tradition of more than forty years of research in the field of comparative and European Community law serves as an excellent starting point for the activities of Leuven CCLE.

The area’s of interest are: (i) the law of the European Union and developments in European human rights and humanitarian law (ECHR law), (ii) the national legal systems of the European countries in a comparative context and in their interaction with European Union law and (iii) the interplay of European (Union) law with international law.

The Leuven CCLE research method consists in bridging the classical dividing lines between legal disciplines and in engaging in comparative and cross-disciplinary legal research, while at the same time embedding legal scholarship in broader social, economic, cultural and political contexts. Studies will not only focus on private law, but also on public law and areas of the law situated at the boundaries of its classical branches.

The first and foremost goal of Leuven CCLE is to promote fundamental legal research on the interaction between the aforementioned different fields and methods, thereby thoroughly analysing bottom-up as well as top-down movements. This approach is necessary in order to determine to what extent the building bricks of national, European and international law can be used to promote a common legal construction for Europe.

Leuven CCLE approaches the law not as a rule set in stone, but as a living and dynamic process. The core of the process is the interaction between different legal orders in Europe: between Community and national law, between separate national legal systems and between European and international law. As the composite of legal rules grows ever more complex, the question of legitimacy of legal rules is perceived as a major subject of research.

The Leuven CCLE aproach to scholarship and research is rooted in the firm conviction, indicated by forty years of comparative analysis, that it will become more and more apparent that legal systems which “prima facie” may look very different are built around common principles that in Europe constitute a ius commune or a common law of Europe.
The Ius Commune Research School
Further information on the Ius Commune Research School is available at:

www.iuscommune.eu
The Ius Commune Research School is a cooperation of the Law Faculties of the Universiteit Maastricht, the Katholieke Universiteit Leuven, the Universiteit Utrecht and the Universiteit van Amsterdam. The School was established in 1995 and is formally recognised by the Royal Dutch Academy of Sciences since 1998. The School accommodates about 220 (senior) researchers and 125 research fellows (PhD students). Apart from the researchers of the four founding Faculties, the School has admitted individual members of the Law Faculties of the Vrije Universiteit Amsterdam and the Université de Liège among its members. Close affiliations exist with the universities of Edinburgh and Stellenbosch.

The Research School facilitates the individual research of its members and promotes the co-operation among these members. In addition, the School takes care of the programme of studies of the School’s research fellows.

The Ius Commune Research School aims at facilitating high-level legal research in the field of international and transnational legal processes. Three different sets of problems are addressed by the School’s researchers:

- What is the role of the law in theory (policy) and practice of international processes of integration and to what extent is transnational integration of legal systems dependent on the commonalities among the national legal systems (ius commune)?
- What positive or negative effects may transnational integration have upon the commonalities among the national legal systems and the autonomy of national legal cultures?
- To what extent can the principles of democracy and Rechtsstaat (constitutional state) serve as a guide in the process of transnational integration? It is tried to answer this question from both a public law perspective (democracy and Rechtsstaat (constitutional state) as foundations of a ius commune) and a private law perspective (the impact of human rights on private law).
The van Gerven Lectures are organised by the Centre for a Common Law of Europe of the University of Leuven in honour of Walter van Gerven, emeritus professor at that university and former Advocate-General at the ECJ. Each year, the Centre invites a prominent legal scholar to share perceptions and ideas about the existence or emergence of a common law of Europe.

The sixth van Gerven Lecture “European and National Property Law: Osmosis or Growing Antagonism?” has been delivered by Prof. Dr. Sjef van Erp on 21 December 2006. Sjef van Erp is Professor of Civil Law and European Private Law at Maastricht University. Until October 2006 he was Marie Curie Fellow at the Centre of European Law and Politics (ZERP) in Bremen. He is President of the Netherlands Comparative Law Association, board member of the International Association of Legal Science and co-founder and Editor-in-Chief of the Electronic Journal of Comparative Law. He was visiting professor at the Université Laval, Cornell University and Trento University and conducted research in Cambridge, Berkeley, Quebec, Harvard, Osnabrück and Hamburg. He is also Deputy Justice at the Court of Appeal of ‘s-Hertogenbosch. His research focuses on comparative and European private law and the comparison of the American federal experience with European integration.

His lecture examines the relationship between European and National Property Law. One of the pillars of the economic constitution of the EU is what might be called “freedom of property”. It is, however, not really clear what is meant by “property” and “property rights” in a private law sense. How can property rights or, rights against the world be defined at a European level? A search for common policies, principles, concepts and rules is badly needed. In the lecture a research map is drawn in which problem areas are presented as well as some suggestions are made as to where this search could lead to, taking the work on the Ius Commune Casebook “Property Law” as a starting-point. For indeed, under the surface of the differing rules, European property law systems seem to share several leading policies and principles, although existing differences should also not be ignored.

The sixth van Gerven Lecture was organised in cooperation with the Ius Commune Research School. The School unites legal scholars from the law faculties of Leuven, Maastricht, Utrecht and Amsterdam. The Lecture closed an international colloquium on “The Bottom-Up Approach to Comparative Law”.

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