

Property Rights in Comparative Perspective: Why Property Is So Ancient and Durable

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INTRODUCTION

The question from which this lecture derives its title can receive a very ironic answer if we observe that the word “property” has by now acquired such a vague meaning and consequently its repeated use in legal discourses is highly ambiguous.

Nevertheless, such an observation only implies that we need to impose some order on our language before we engage in any comparative analysis. Comparative law scholars are indeed the first victims of this ambiguity in the contemporary notion of property, because their goal is to compare the structure of institutions and not merely words.

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Obviously ordering in our language is not that simple. Certainly it is not a problem of mere terminology; on the contrary, it is necessary to clarify where and why this terminology became so vague.

Certainly the reason for the lack of clarity cannot be the novelty or the marginal importance of the issue; discourses related to property can be found in most of the ancient legal documents available to us¹, and nowadays the transition from socialism to capitalism in many states in Eastern Europe and Asia has brought private ownership to an unexpected level of importance around the world.² Furthermore, the protection of intellectual property (IP) afforded by supranational sources such as the TRIPs/WTO agreements and the Charter of Fundamental Rights of the European Union, expands the boundaries of property rights in those legal systems that previously failed to recognize IP as a legitimate form of property. From an historical as well as a geographical, and, finally, from a legal standpoint, “property” and in particular “private property” appears to be a dominant legal institution.

The question therefore is why the contemporary concept of property has lost its historical context.

I will present my view on this issue in four parts.

Part I identifies the different types of audience involved in the property discourse and examines the gulf between the technical legal approach and the moral/political issues at stake in property discourses.

Part II explores the theory of property that currently prevails in Europe and in the USA.

Part III explores the possibility of dealing with property matters by accepting their inherent complexity and trying to figure out the several basic and secondary elements of property structure in the context of a continuous interaction between the subjective and the objective side of property.

Part IV provides an historical overview of the origin of several elements of property in the form of stratigraphic analysis evaluating the reasons for their persistence and transformation.

1. See L.J. GELB, *A STUDY OF WRITING* (Chicago Univ. Press 1963); J. BOTTÉRO, *MÉSOPOTAMIE. L'ÉCRITURE, LA RAISON ET LE LES DIEUX 75 et seq.* (Gallimand 1987).

2. See H. Demsetz, *Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership*, 31 *J. LEGAL STUD.* 653 (2002).

PART I

A. *Property Discourses in Moral Philosophy and in Technical Legal Practice*

A first step towards clarifying language is ascertaining the context and the audience before which the word “property” is used.³ Surely, lawyers are not the only people interested in property matters. Indeed, property has never been ignored in Western thought. All classical thinkers, from Plato and Aristotle to Grotius and Locke, Rousseau and Kant, and Hegel and Marx, assigned property an important role in theories regarding the proper organization of societies and human values.⁴

There are several reasons why a distinction should be drawn between legal and philosophical contexts. One is that, notwithstanding the close attention that learned jurists have paid to discussions of property in the context of political/moral theory, the technical legal and political/moral approaches form two distinct bodies of literature, followed by two distinct circles of specialists. As a result, the audiences are quite different.⁵

The basic reason why a distinction must be made is however a more general one: Whatever special discipline exists, such as law, political science, economics, or moral philosophy, it exists only because in the beginning its members selected a specific set of problems to deal with and, where possible, to resolve. In consequence a body of technical words is set out to deal with the specific problems that are the object of the inquiry. These words, as signifiers, can have meanings common across various discourses, but they are presumed to carry a specific intentional meaning to fit the concerns and unstated assumptions of the discipline.

When property issues arise in the context of political/moral theory, the traditional problem on which attention is focused is the moral

3. See H.E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STANFORD L. REV. 1105 (2003).

4. See S.R. Munzer, *Introduction*, in S.R. Munzer (ed.), *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY I* (Cambridge Univ. Press 2001).

5. Sometimes a distinction is made between property doctrine and property theory, the first being the systematic analysis of the way in which the concepts, institutions and rules of private property hang together; the second being the related discourse on the justification, distribution, function and meaning of property rules and practices in society. For this distinction, see A.J. van der Walt, *Reform from Within Property System: Reflections on the Maastricht Colloquium*, in G.E. VAN MAANEN & A.J. VAN DER WALT, *PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY* 671 (1996). It is however difficult to understand how the function and the meaning of property rules and practices can be discovered independently by property doctrines.

legitimacy of the institution of private property. Consequently, a more detailed analysis is performed on the original starting point, i.e., the legitimacy of acquisition—a problem virtually identical to that of justice in the distribution of property. When property is transferred, the original position is a hypothesis of some intellectual interest in the context of legal analysis, but is quite unlikely to have any relevance in legal practice.⁶

Above all, in a political and moral approach the legitimacy of property is discussed with reference to the extreme paradigm of absolute ownership. The reason why such a shift occurred is easily detected. It was observed centuries ago that if absolute individual ownership could be proved legitimate, then all other less complete sets of property rights could be considered legitimate as well.

Legal/technical problems related to property are rarely involved in extremely compact positions where all the sticks in the bundle are attributed to an individual; on the contrary, they derive from cases in which several persons have a claim over the same resource.

A good example of the shift to an extreme position in order to assert the legitimacy of property rights is the famous statement by Blackstone at the beginning of the second book of his Commentaries on the laws of England, where Blackstone recalls that the *jura rerum* under consideration are what the “writers on natural law stile as the right of dominion or property” and adds that “there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of world in total exclusion of the right of any other individual in the universe.”

Interestingly enough, some pages later in making reference to the origin of the word “fee”, he recalls that *feudus* was in opposition to *allodium* and introduces the notion of *allodium* to his readers, stating that: “this is property in its highest degree, and the owner thereof hath *absolutum et directum dominium*, and therefore is said to seized thereof absolutely in *dominio suo*.” But after a few lines Blackstone is obliged to modestly confess that “this allodial property no subject in England has.”

That is to say that Blackstone was aware of the gulf that exists between the theoretical paradigms of the natural law school and the effective organisation set out by the English Law of Property. He introduced the now famous statement regarding the right of property in

6. Cases related to the problem of first possession are seldom offered to American law students. No recent case exists and the most frequent case offered is *Pierson v. Post* (N.Y. 1805), which is also the oldest case normally mentioned in property law text books.

general only to show that he was a learned man, fully aware of the philosophical debate going on in Europe at his time. But for the remaining five hundred pages or more, his technical description of the law of property pertains to a complex bundle of rights over the land where the basic idea of “*absolutum dominum*” was remarkably absent.

This has not prevented other readers from consulting the second page of Blackstone⁷ and subsequently gave rise to a notion of Blackstonian property that probably had no counterpart in Blackstone’s thought.⁸

B. The Origins of an Unhappy Fusion

If Blackstone was not a Blackstonian, there is reason to ask why Blackstonian theory became so popular and completely overshadowed the literary source. The most probable hypothesis suggests that an incisive phrase which Blackstone had inserted in his presentation captured a widespread audience because it was in line with a widespread mentality. The main idea which circulated at the time of Blackstone and which continued to spread in the following century was that the notion of private property can resolve in simple fashion all problems which Western thought had struggled with since the beginning of Greek thought to the modern age. The eternal issues of freedom, justice, and citizenship were made to depend on the existence and distribution of property. This simplification provided the foundation for debate among rival theories on the moral legitimacy of private property. The fact that theories by John Locke and J.J. Rousseau, and later by Karl Marx, offered conflicting solutions, incited argument, and thus made the learned discussion appealing. However, it was also true that they adhered to the same manner of reasoning and argumentation, a common ground of public debate.⁹ This permitted the center of the debate to move towards political implications, starting from the close association between property and citizenship accepted by both sides. In this regard it was usual to hear that citizenship in terms of conscientious and autonomous political participation required that the citizen have economic independence with

7. The famous statement is at page 2 in the original edition (Oxford 1766, facsimile, Univ. of Chicago Press 1979), and also at page 2 of the first American edition (Phila. 1771, reprinted by Oceana Pub. Inc., New York 1967).

8. See D.B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRES IN LAW 103 (2009).

9. Similarly, Hobbes and Hugo Grotius are considered to be the two opposite extremes of political thought of the 17th century, disagreeing both on theoretical premises as well as political ambitions; however, their reasoning and methods are identical. Cf. E. CASSIRER, *THE MYTH OF THE STATE* ch. XIII (1946).

respect to political power. One of the strongest supporters of this theory was Madison.¹⁰ The argument could, however, be reversed simply by observing that the existence of individual private property, being necessarily a source of independence for some but not for all, constituted the supreme obstacle to full political participation for all, that is for universal citizenship¹¹.

These radical bifurcations of political and philosophical thought appeared in economic theory, where the initial demonstration of the beneficial nature of private property, based on the well-known example that nobody is interested in plowing and sowing unless he is assured the right to exclude others upon harvesting, could be contradicted by the statement that the protection of the harvest need not be limited to individual property, but can be protected by communal rights. This argument goes back to the distinction introduced by Pufendorf regarding positive *communio* and negative *communio*¹², a distinction that has been disregarded in the subsequent discussion within Natural Law School and its aftermath, probably because it contrasts with the trend toward simplification of the basic issue.¹³

It does not surprise anyone that in the middle of these diatribes property became a powerful verbal symbol around which ideological alliances are organized.

10. See J. NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM. THE MADISONIAN FRAMEWORK AND ITS LEGACY (Univ. of Chicago Press 1990).

11. Another inversion of the discourse is found in those who seized the freedom, not in the right to participate in public life, but in avoiding as much as possible the obstacles created by the legal system to the free development of individual activity. Their intention was to emphasize the relation between the right to property and the right to economic freedom. The idea that the "government" must be limited is coessential to the American constitutional tradition. Even if the possibility of a minimal State is worth being taken seriously, see R. NOZICK, ANARCHY, STATE AND UTOPIA (Basic Books, New York 1974), the case of property is nevertheless a counterproductive example, considering that private property, instead of a minimal state, requires a kind of state protection that is so intense as to justify governmental intervention. See STEPHEN HOLMES & C.R. SUNSTEIN, THE COST OF RIGHTS (1999). As we shall see at the end of this Article, historically individual property rights are linked with the development of a strong legal order, normally exercised by a strong State. The problem of the cost of property systems has been underlined by H. Demsetz, *Toward a Theory of Property Rights*, in 57 AM. ECON. REV. 347-59 (1967). For an expansion of Demsetz's view, see Demsetz, *supra* note 2.

12. See S. PUFENDORF, DE JURE NATURAE ET GENTIUM, LIBRI OCTO lib. IV, cap. IV,2 ("Deinde accurate expendendum, quid sit communio, quid proprietatis sive dominium. Communio vocabulum accipitur vel negative, vel positive" (followed by the explanation referred to under point IV,5, according to which negative *communio* corresponds to the category of *res nullius*, while positive *communio* represents collective property).

13. The affinity with the mainstream of the political tradition explains why Blackstone's statement became famous, while Pufendorf's fine distinction according to legal analysis has been neglected.

According to the style of the political debate, when the paradigm of absolute property was imposed, everything belonging to the legal and technical notion of property rights was overshadowed, where absoluteness was conceived in the sense of unlimited dominion of the owner over the property, since this was the basic assumption on which all agreed¹⁴.

In this context, comparative law analysis of property becomes problematic—thus explaining its scarcity¹⁵—because the comparative law method requires starting with differences in order to find common structural substrates.

It is also worth noting that this condition persists even if the intellectual atmosphere has changed.

During the 20th century the conditions of convergence among political-philosophic thought, economic thought and legal thought gradually subsided. This should cause no surprise due to the fact that it is normal that diverse research traditions should diverge. The convergence on the theme of property which occurred in the 17th-19th centuries was, on the other hand, quite unexpected.

In any case, as is known, by the end of the 20th century the topic of citizenship was no longer connected to property,¹⁶ since the condition of free and conscientious participation in political life is connected with universal schooling as well as the jurisdictional protection offered to the rights of citizen. The attempt to place property at the center of the citizenship issue by means of the “new property” formula¹⁷ proved to be ephemeral.¹⁸ Even more evident is the dissolution of the tie between

14. For an account of the debate in the XVIII and XIX centuries in Europe, see M. XIFARAS, *LA PROPRIÉTÉ: ÉTUDE DE PHILOSOPHIE DU DROIT* (Paris, Puf 2004). In presenting the view of opponents of the legitimacy of property, the A. (p. 12) properly quotes the DEUXIÈME MÉMOIRE SU LA PROPRIÉTÉ, by Pierre-Joseph Proudhon, which ends with the famous statement that “la propriété c’est le vol”. It is interesting to note that that famous Memoire opens with the classic statement: “la notion la plus exacte de la propriété, c’est le domaine absolu, exclusif autocratique de l’homme sur la chose.” Indeed Proudhon was a Blackstonian before he became the herald of utopian socialism.

15. *But see* U. MATTEI, *BASIC PRINCIPLES OF PROPERTY LAW. A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION* (Westport, Greenwood Press 2000). And in comparative perspective, A.N Yiannopoulos, *Property*, in Kerameus & Kozyris eds., *INTRODUCTION TO GREEK LAW* 121-32 (2d ed. 1993) (1988); A.N. Yiannopoulos, *Property*, in Clark & Ansary eds., *INTRODUCTION TO THE LAW OF THE UNITED STATES* 199-218 (1992).

16. *Cf.* K.R. Minogue, *The Concept of Property and Its Contemporary Significance*, in J.K. PENNOCK & J.W. CHAPMAN, *PROPERTY 3 et seq.* (Nomos, XXII, N.Y. 1980).

17. *Cf.* Charles Reich, *The New Property*, 73 *YALE L.J.* 733 (1967). On the notoriety of said essay, see F.F. SHAPIRO, *The Most-Cited Articles from the Yale Law Journal*, 100 *YALE L.J.* 1449 (1990).

18. *Cf.* W. van Alstyne, *Cracks in “The New Property”*, *Adjudicative Due Process in the Administrative State*, 62 *CORNELL L. REV.* 445 (1977).

property and economic efficiency which was established in previous centuries. Obviously, at least from the end of the 20th century, such a connection existed, but the starting point is no longer the alternative of belonging or not belonging. On the contrary, the relevant theme to which attention was paid in the 20th century is how property rights should be distributed. Starting from tentative thoughts concerning the separation of ownership and control within company structures¹⁹, up through more refined theories which today analyse how power, rights and faculties of disposal and management of company assets should be distributed in the most efficient way²⁰, the focus is on the various forms of ownership, thus abandoning the hypothesis that private property is the only form of property.

The loss of faith in the existence of a connection between private property and the whole of the aforesaid problems has been called the disintegration of property.²¹ However, the loss of an illusion and the end of a century-long idea do not eliminate a legal institution, provided that any further illusion to remove from discussion an institution not cancelled from actual history is not being contemplated.

C. Jurisprudence and the Theory of Property: Ontological and Analytical Perspectives

The task of bridging the gap between the moral/political theory of property and positive property techniques pertain to the general theory of law, or jurisprudence.

Obviously, however, to solve a problem, one must first be aware of its existence.

In the prevailing literature, the differences between technical problems and moral problems concerning the theory of property are normally ignored due to the received wisdom that property arrangements are controlled by prevailing ideology. To some extent the link between prevailing ideology and understandings of property is justified,²² but it is questionable whether ideological control over technical legal solutions is so complete. From an historical point of view, the assumption that property arrangements are fully controlled by politics is equivalent to the

19. See A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

20. For a brief intellectual history, see M.A. Eisenberg, *The Conception that the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1998-1999).

21. See Th. C. Grey, *The Disintegration of Property*, in PENNOCK & CHAPMAN, *supra* note 16, at 69.

22. See J.G. SPRANKLING, *UNDERSTANDING PROPERTY LAW* 12 (2d ed., Lexis Nexis 2007).

hypothesis that when the same ideology largely prevails in a certain society in a certain time, as did liberalism in the 19th century in Western Europe and in the USA, then enacted legal rules and precedents and even the doctrinal presentation of property would amount to mere translation of ideological commandments.

Nothing is certain in any translation process and therefore such an assumption is at least suspicious, and in fact historical research has uncovered evidence which supports the opposite contention, showing that legal practice in this period was not controlled by an ideology if the term “ideology” is interpreted in the sense of a coherent theory of society. For instance, the law in 19th century France did not always support an owner’s individual rights,²³ even though liberalism was triumphant in the public and political arena. On the contrary comparative law studies reveal that legal rules and doctrinal presentation of the law of property were conspicuously different in Civil law and Common law systems.²⁴ But if one reads Guizot or Demolombe she must conclude that French legal doctrine was at the forefront in promoting *laissez faire*, a French expression after all.²⁵

If political ideology does not extensively control property arrangements and the gulf between the two is ignored, then it is difficult to believe that legal theory can build a bridge between moral and political philosophers and practical jurists.

Indeed, in the field of jurisprudence we can find extremely interesting research papers which deal with concepts such as freedom, honesty, power, and coercion, but if we open a property textbook, after the first chapter dealing—in pure Blackstonian style—with theoretical foundations of property law, we will find chapters dealing with the

23. To be sure constitutional protection of ownership was totally nonexistent.

24. This difference is still one of the main obstacles to the harmonization of European law. See A. Gambaro, *Property*, in 1 M. BUSSANI & F. WERRO, *EUROPEAN PRIVATE LAW: A HANDBOOK* 47 (Seiller 2009).

25. The difference between (French) civil law and common law in protecting property rights and thus in enhancing economic freedom has been emphasized by the legal origins movement. See, in brief: R. la Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008); M. Siems, *Statistische Rechtsvergleichung*, 37 RABELSZ 354 (2008); C. Milhoup, *Beyond Legal Origins: Rethinking Law’s Relationship to the Economy—Implication for Policy*, 57 AM. J. COMP. L. 831 (2009); R. Michaels, H. Sapmann; B. Favarque-Cosson, C.J. Milhoup, J. Reitz & V. Grosswald Curran, *Symposium on Legal Origins*, 57 AM. J. COMP. L. 765 (2009). The writers of *Legal Origins* would probably assume that even in the 19th century, civil law attitudes were not liberal at all. However the starting point for this type of evaluation is the appraisal of the law in action and not the analysis of legal and political discourses; as a consequence the legal origins perspective cannot be used to deny the possibility of a contrast between prevailing political ideology and the shape of a legal system.

traditional partition of real property and estates, future interests, concurrent ownership, personal property, etc.

Thus, a further look at how jurisprudence has influenced property law is necessary.

Modern jurisprudence is normally divided into three main areas: natural law, analytical jurisprudence and normative jurisprudence. However, only the second seems to maintain a relative degree of independence from political philosophy. Up to now the attractive force of moral/political tradition has overshadowed the other branches of jurisprudence, preventing them from fulfilling the aforesaid bridge function.

Within the analytical branch two approaches to property can be distinguished. The first one starts by exploring the ontology of things and then considers the problem of access to and control of scarce resources deriving from material objects, even though by analogy property rules can be extended to intangibles²⁶. The second one is linked to the assumption that a legal system concerns relationships between people and consequently in an analysis of property rights it is essential to start from the concept of legal relationship.

From a comparative standpoint, ontological approaches appear to be largely preferred in Europe while the relationship approach has deeply influenced modern U.S. experience.

To some extent this partition is understandable, because it mirrors the historical traditions in civil law and common law, but such a contrast cannot be resolved on the basis of logical analysis because it pertains to the basic assumptions of any type of analysis and in reality is based on a long story of conceptual discrepancies.

This is the same difficulty scholars of comparative law have faced. It is well-known that a significant difference exists between the German model adopted in numerous European legal systems as well as by Japan and the model favored in common law systems. In the first case, property is only acknowledged in relation to a corporeal thing, while in the second case property concerns an abstract entity such as an estate and often is described as being a legal relation between individuals. Another group of national systems, including that of the UK, seems to place itself in the middle by adopting the suggestion that ownership must be conceived with reference to material objects, but simultaneously accepting that its rules and principles can be extended by analogy to

26. See J. Waldron, *What Is Private Property*, 5 OXFORD J. LEG. STUD. 313 (1985); A.M. Honoré, *Ownership*, in A.G. Guest (ed.), OXFORD ESSAYS IN JURISPRUDENCE 108 (Clarendon Press 1961).

immaterial objects²⁷. Other legal traditions, such as that of France, seem to split between a majority view quite similar to the Roman tradition and a resilient minority view²⁸ ready to accept that property, being the result of a universal obligation to abstain from interference, can apply to an incorporeal object such as the “droit de credit”. A certain number of civil law systems, and also, even if in an ambiguous form, China’s Property Law²⁹ have introduced references to immaterial objects in their civil codes or legislation, but it is still unclear what these immaterial objects are outside the domain of Intellectual property³⁰.

Comparative law probably has the means to solve this problem or at least to understand it, however, while analytical approaches do not.

PART II

A. *Ownership as a Res Corporalis in Roman and Civil Law*

In the civil law tradition, an immense amount of literature deals with the history of the theoretical definition of ownership³¹. In the *jus commune* the most famous definition was given by Bartolus, who defined ownership as “*Jus in re corporali perfecte disponendi*”.

The origin of this type of definition can be traced to the famous distinction introduced by Gaius between *res corporales* and *res incorporales*.

This distinction was introduced in the Justinian Compilation and has proven to be of paramount importance in the civil law tradition. Many civil law codes, including the Louisiana Civil code, distinguish

27. See Honoré, *supra* note 26, at 107; J.C. Sonnekus, *Property Law in South Africa: Some Aspects Compared with the Position in Some European Civil Law Systems—The Importance of Publicity*, in VAN MAANEN & VAN DER WALT, *supra* note 5, at 287.

28. This is the case of French legal doctrine, in which a minority of the leading authors followed the tradition of Bierling, Rougin, Planiol, Ginossar. See F. ZENATI & Y. REVET, *LES BIENS* (Paris PUF 1997). A historical account, in J.L. HALPERIN, *HISTOIRE DU DROIT DES BIENS* (Paris, Economica 2008).

29. The Property Law of the People’s Republic of China was adopted on March 16, 2007, to take effect from October 1, 2007. Article 2 of the said law provides:

The word “property” as a term used in this Law includes movable and real property. Where there are laws stipulating rights as the objects of property rights, they shall be observed. The phrase “property rights” as a term used in this Law refers to the exclusive right enjoyed by the obligee to directly control specific properties including ownership, usufructuary and security right in property rights.

30. See W. Mincke, *Objects of Property Rights*, in VAN MAANEN & VAN DER WALT, *supra* note 5, at 651.

31. See, e.g., E.J.H. Schrage, *Ius in re corporali perfecte disponendi: Property from Bartolus to the New Dutch Civil Code of 1992*, in VAN MAANEN & VAN DER WALT, *supra* note 5, at 35.

between *corporales* and *incorporales*. In modern times, the distinction makes reference to the classification of things from an ontological point of view, even if it is admitted that incorporeal things are rights³², and in consequence the juxtaposition of material objects on one side and rights on the other implies that the category of things is not a logical category.

The reason for this is mainly historical and can be summarized as the distortion created by the medieval inability to understand Roman law taxonomy.

Indeed Gaius's taxonomy was intended to refer not to the nature of things, but to the specific features of patrimonial rights, and it was deemed very elegant because it made it possible to classify all rights which compose an estate into two classes. Gaius based his reasoning on mercantile civilization and probably he envisaged how the estate of a wealthy merchant in Beirut could be divided amongst heirs after his death.

The reasoning behind the fundamental division into corporeal and incorporeal object was legal and practical, not ontological.

Gaius assumed that because ownership entitles the owner to use all valuable utilities of a corporeal thing, the value of the right of ownership of a corporeal object was equal to the value of the thing itself. This value is obtained by the process of appraisal that takes place after the death of a wealthy person.³³

Of course, the appraisal process starts with the examination of the thing itself. Clearly the value of a thing varies in connection with its specific qualities: a good horse is more valuable than a sick horse. But if the horse is an object of ownership then the value of the specific horse that has been appraised is equal to the value of the right that was part of the estate of the deceased person. In consequence, it was convenient to delete the medium and make reference to the corporeal thing itself. By contrast, if the deceased person held another right differing from that of ownership, such as a right of usufruct or another real right, then the value of the thing, as assessed by the appraiser, could not enter directly in the calculation of the value of the entire estate, because the value of the asset

32. The first person to state, with reference to the nature of the things, that the distinction was nonsensical was, to the best of my research, John Austin, in his lectures on JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (1863). He observed: "In the Roman law, things corporeal are permanent sensible objects considered as the subjects of rights and duties. . . . Things incorporeal are rights and duties themselves. The distinction is utterly useless: inasmuch as rights and duties, having names of their own, need not to be styled incorporeal things." *Id.* at 777 (5th ed., London 1885).

33. Cf. G. Pugliese, *Dalle "res incorporales" del diritto romano ai beni immateriali di alcuni sistemi giuridici odierni*, in RIV. TRIM. DIR E PROC. CIV. 1137 (1982).

depends on the nature and the extent of the right and not only on the quality of the thing. So ownership became the *res corporalis*, and as it was the only member of its class, all the other patrimonial rights were placed in the second class. Because the first was named *res corporales*, the second took the name of *res incorporales*.

This taxonomy implies several consequences. First, the concept of “*proprietas*”/ownership was strictly linked to the notion of corporeal object. Second, Gaius’s taxonomy could be used only if the right of ownership was conceived as an absolute right, in the sense that it conveys to the owner all valuable resources that can be extracted from a corporeal object. On the contrary, if ownership was conceived as a bundle of rights, each one having its own shape, then the inherent logic of Gaius’s taxonomy was not applicable.

This was exactly what happened in Europe during the medieval age and the first part of modern age, when the most important type of property, that is property in land, was organized under the form of “*plura dominia*”, and parts of the latter were later included in the category of real rights alongside servitudes which originally had been separate.

However the force of the Roman sources was so strong that in order to preserve Gaius’s taxonomy, *right in rem* was presented as *right in re corporalis*, with the consequence that only allodial property was fit for the definition, but all the others forms of property that were originally outside were later introduced into the category by legal fiction.

Legal practitioners were unaware of these logical difficulties, because disputes were focused mainly on possession, and possession was a complex issue.

First, Roman law had handed down to the *ius commune* a series of ambiguities which mainly consisted in the fact that possession was both a tool used to acquire property—through *usucapio* and *prescriptio longi temporis*—and a legal status worthy of protection by means of *interdicta*. Second, German law was based on the notion of *Gewere*, and the translation of the word *Gewere* as the Latin word “*possessio*” had generated a good amount of confusion. Lastly, Canon law had intervened in this area by introducing a remedy, known as *actio spoli*, which in reality protected possession over property title. Common law lawyers, used to the principle of better title, find it difficult to imagine the problems that *actio* and *exceptio spoli* had introduced in terms of property rights.³⁴ In fact, the rule *spoliatus ante omnia restituendus* means that in the possessory proceeding the owner is allowed neither to

34. *But see* A.N. Yiannopoulos, *Possession*, 51 LA. L. REV. 523 (1991).

give evidence nor to argue upon his title to property. This could be achieved only after the judgment concerning possession became final and enforced. The practical result of this innovation was that lawyers presented the legal position they defended as a state of possession rather than as one of title.

In light of this confusion, the draftsmen of the Code Napoléon, lacking the guide of Pothier, cut the Gordian knot with the sword of the lawmaker. In other words, in the field of real estate, possession was expelled from the civil code. The solution resulted in excessive confidence in the assumption of omnipotence by the lawmaker. In fact, the protection of possession was reintroduced soon after by case law.³⁵

In reality, it was Savigny's turn to order and modernize the subject of possession, which he did in three steps. First, the legal effects of possession were strictly connected to the mechanism of acquisitive prescription. As a result, he assumed in the second stage that possession is legally only a fact which produces legal effects, since it consists of having access to property, a solution that enhanced the role of possession in the transfer of movable property. Above all possession as a fact could be conceived only in relation to a corporal object, and in consequence the very idea of possession of rights was deleted. Third, he eliminated both *actio spoli* and above all *exceptio spoli*³⁶, recasting them within the scope of the "*de vi*" interdict which is substantially the same remedy as the writ of trespass.

The reorganisation of the concept of possession introduced by Savigny determined the transition from a legal theory suitable for an agricultural society to a legal theory fit for an industrial society and this explains the reason why, with some reservations concerning real estate rights, the theory was welcomed all around Europe. The underlying implications deserve additional thought. The strict connection between the legal importance of possession and the statement according to which possession had reference only to tangible assets was obviously based on the literal tone of the Justinian sources. Also Pothier³⁷ was obliged to

35. Articles 2282 and 2283—De la protection possessoire have been added to the French civil code only in 1975 (L. n° 75-596, 9 juill 1975, art. II).

36. Cf. C.F.V. SAVIGNY, *DAS BESITZ*, VI, ed. § 50, which is one of the most important parts of the famous essay.

37. In *Traité de la possession*, Ch. III, § 37, Pothier stated with reference to the Justinian sources that possession is acknowledged only for tangible assets (Book 3 ad adq poss.: *possideri possunt quae sunt corporalia*); but then opened to *quasi possessio*: cf. § 38 ("Les choses incorporelles, c'est à dire, celles quae in jure coinsistunt, ne sont pas susceptibles, à la vérité, d'une possession véritables et proprement dite; mais elles sont susceptibles d'une quasi-possession.").

state that the possession of rights could not be contemplated, but as an important positive law scholar he added that such forms of possession were to be acknowledged.³⁸ More rigid in the revelation of the historical truth behind Roman law, Savigny supported the opposite theory, which fortuitously coincided with modern ideas.

It must be observed, however, that in Savigny's time mere reference to the Justinian sources would probably have failed to acquire the majority consensus among European lawyers; the consensus achieved by Savigny's theory of possession is better explained by reference to relation between his thesis and the cultural background of his time. The assumption that possession is a factual condition which produces legal effects was safe, but the secondary assumption that possession is conceivable only in relation to material objects requires several additional steps. First it is assumed that a relation of fact must be objectively perceivable by the social community to produce legal effect. In Savigny's time, Immanuel Kant asserted that all our knowledge derives from experience and that our ability to understand is influenced by objects which trigger our senses.³⁹ Considering that Kant, as in all ancient and modern philosophy, believed that only natural objects are objects which trigger our senses,⁴⁰ the way opened for Savigny's idea that a condition of fact such as possession could only refer to tangible goods. But since the transformation of possession into propriety through acquisitive prescription was essential to the ownership regime, property could only be perceived by reference to tangible assets.

So the German experience went back to Gaius and to his characterisation of property as a *res corporalis*, but the corporeal character of the object was extended to all the members of the category of "real rights".

Unfortunately the two taxonomies are inconsistent, because following Gaius's perspective only ownership is a *res corporalis* and thus the category of *rights in rem* cannot have more than one member. This is unacceptable because the proper organization of landed property requires a multiplicity of different rights, the modern Roman systems are forced to assume a very basic principle and then ignore it. Evidence of this can be found in the German BGB. One of the cornerstones of the BGB is the opposition between real rights, on one side, and personal rights, or

38. In reality, in 18th century French society, possession of status was very important, with reference to family status.

39. Quotes from the Introduction to the second edition of *Critik der reinen Vernunft* in various editions.

40. Social objects received scarce attention in the cultural atmosphere of the period.

relationships involving obligations, on the other. To maintain this clear distinction, § 90 of the BGB establishes that the entire Sachenrecht refers only to corporeal things, but then, it also includes in the Sachenrecht pledges for credit (Pfandrecht an einer Forderung § 1279-1290) and Usufruct on rights (Nießbrauch an rechten § 1068-1084), one of the very few inconsistencies of the German civil code.⁴¹

B. Property as a Relationship

Another property theory worthy of mention is an idea which originated in Germany in the 19th century. If the classification of things by Gaius followed a long track in history, the presentation of ownership as a bundle of Theilverhältniss travelled extensively in geographical terms. The issue at hand is well-known.

During the 19th century, German legal thinking considered the law a special branch of formal logic. Ernst Rudolph Bierling, on the basis of some insights by Leibniz, maintained that the law can regulate only relationships between human beings and as a result the only basic legal concept must be Rectverhältnisse⁴². Consequently, it is a mistake to consider the category of *jura in rem* and the distinction between Sakenrechts and Obligationenrechts is nonsense. The diffusion of this principle is well-known⁴³. Rejected in Germany and partially accepted in France, it was accepted in England by Salmond⁴⁴ and triumphed in America with Hohfeld, providing an outstanding contribution to the American legal technique through analytical jurisprudence. Originally, however, the bundle of rights was conceived in connection with legal relationships between human beings. Midway, a relationship was established between a person—the owner—and the right vested in him.

In current American legal literature, the basic idea set out by Bierling and refined by Hohfeld is better reflected when the law of property is presented as a system that concerns legal relations between people regarding the control and the disposal of valued resources⁴⁵, or when it is asserted that property denotes the relation between an

41. See U. Drobning, *in* CH. VON BAR & U. DROBNING, *THE INTERACTION OF CONTRACT LAW AND TORTS AND PROPERTY LAW IN EUROPE. A COMPARATIVE STUDY* 534 (Sellier, München 2004).

42. See E.R. BIERLING, *ZUR KRITIK DER JURISTISCHEN GRUNDBEGRIFFE* 174, 181 (Gotha 1977).

43. See R. Pound, *Fifty Years of Jurisprudence*, 51 *HARV. L. REV.* 557 (1938).

44. See J.W. SALMOND, *JURISPRUDENCE OR THE THEORY OF THE LAW* 222 (2d ed., London 1907) (“Ownership, in its most comprehensive signification, denotes the relation between a person and any right that is vested in him. That which a man owns is in all cases a right.”).

45. See J.W. SINGER, *INTRODUCTION TO PROPERTY* 2 (Aspen Law & Business 2001).

individual and the community with regard to the use and exploitation of resources,⁴⁶ rather than when it is considered a system to control the acquisition, use and distribution of valued resources.⁴⁷

The main problem with the Bierling/Hohfeld approach is similar to that which came out at the very beginning. Setting aside the specific characteristics of the object of a property right and the related use not only creates difficulties in anchoring the law of possession⁴⁸, but also in shaping the bundle of titles the owner is entitled to exercise⁴⁹. Even the right to exclude, for sure one of the primary elements in the bundle of rights commonly characterized as property⁵⁰, cannot be assessed in the same way in reference to a dwelling and to the use of premises for a tavern. In such a case, indeed, the innkeeper is more of a regulator than an exclusive owner, even if she retains the right to dispose of the premises in some other way. The rule of non-exclusion from public accommodations has been continuously in force for the last five thousand years even if from time to time jurists are still discovering it.⁵¹ Forgetting the nature of the object seems to narrow the potential for understanding the law of property and forces the jurist to rely solely on the legislative structure of property rights.

46. See J. CRIBBET, R.W. FINDLEY, E.E. SMITH & J.S. DZIENKOWSKI, *PROPERTY: CASES AND MATERIAL 2* (9th ed., Foundation Press 2008).

47. See E.H. RABIN, R. ROSENTHAL KWALL, J.L. KWALL, *FUNDAMENTALS OF MODERN PROPERTY LAW 1* (5th ed., Foundation Press 2006); E.E. CHASE, *PROPERTY LAW: CASES, MATERIALS, AND QUESTIONS* (Anderson Pub'g 2002). Few American textbooks present in addition to the prevalent view, the traditional conception of property as a right to a thing good against the world. See, e.g., TH. W. MERRILL & H.E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES 1* (Foundation Press 2007). It is even possible to skip the usual opening question: what is property? The usual answer which follows is that it is surprisingly difficult to give a definition of property. See P. GOLDSTEIN & B.H. THOMPSON, JR., *PROPERTY LAW: OWNERSHIP, USE AND CONSTITUTION* (Foundation Press 2006).

48. That was the main criticism of Bierling, but we can consider it as contingent on the specific condition of German civil law of the time.

49. In the civil law traditions, the conception of property as a right to a thing is to some extent preserved by the necessity of taking into account the protection of property through actions of recovery of possession, conceived under the form of *rei vindicatio*, which states that the defendant must be identified as the current possessor of the thing and not as author of the wrong. The same type of criteria for the identification of the defendant is used in the law of Trusts, but in civil law the scheme of *rei vindicatio* is of general relevance, because it is one of the three remedies that can be envisaged. The other two are actions in tort, which require the identification of the individual who committed a wrong, and actions arising from a contract. In both cases, it is necessary to look at the origin of an obligation. In the case of *rei vindicatio*, the person sued is the one holding a thing at the moment the action starts.

50. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

51. See *Uston v. Resort Int'l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982).

The same kind of criticism can be made when property is presented as a set of social relations rather than legal relations,⁵² and for even more compelling reasons. Undoubtedly, an organizing value must be attached to the property and the latter entails obligations as stated under article 14,2 of the German Grundgesetz.⁵³ Consequently, property can be placed at the center of social relationships, but it is very doubtful that a metaphor can stand in the place of a legal definition.⁵⁴ These remarks are not meant to obscure the significant advantage on which the bundle of rights approach is based: that is, in abandoning the old hypothesis of material things as the only object of property rights thus allowing it to include nonmaterial things⁵⁵ and to consider the complexity of technical property arrangements. But these advantages can be useless if the meaning of property becomes equivalent to the meaning of *droit subjectif* under French law, and for two reasons: first of all, from a logical standpoint, as Austin pointed out, it makes no sense to define the entitlement of a specific right as property; second, as to legal taxonomy, there is no significant advantage in putting aside the traditional distinction between *rights in rem* and *rights in personam*,⁵⁶ apart from the possibility of disdaining traditional legal technical categories, a position in which some “hubris” can be detected.

52. See S.R. Munzer, *Property as Social Relations*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY, *supra* note 4, at 37 (discussing the view of property held by Felix S. Choen, Robert L. Hale, Duncan Kennedy, Joseph William Singer, J.B. Macpherson, and Jennifer Nedelsky).

53. See Basic Law for the Federal Republic of Germany:

Article 14(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. (2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of disputes concerning the amount of compensation, recourse may be sought before the ordinary courts. Article 15: Land, natural resources and means of production may for the purpose of socialization be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation. With respect to such compensation, the third and fourth sentences of paragraph (3) article 14 shall apply *mutatis mutandis*.

54. The second problem with the social relation approach to property is that it is far from clear whether it represents a new concept of property or is only an attempt to undermine orthodox justifications. See Munzer, *supra* note 52, at 45.

55. An interesting focus on the subject is in S.H. JOHNSON, P.W. SALSICH, JR., TH.L. SHAFFER, M. BRAUNSTEIN & A.M. WEINBERGER, PROPERTY LAW: CASES, MATERIALS AND PROBLEMS (3d ed., Thomson 2006), where the focus is more on intellectual property and other problematic issues.

56. See H.E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001)

C. *Modern Legal Doctrines and the Persistent Puzzle of Rights In Rem*

From a theoretical point of view, the disintegration of Blackstonian property represents an advantage given that incorporating all questions concerning social relations into the concept of property was the obstacle which hindered understanding the various dimensions of property itself.

In order to perceive the various dimensions of the notion of property, it is necessary to start from a multidisciplinary approach, that is, a consideration of the various aspects of the same subject. From an historical point of view, the elaboration of the concept of private property in Western thought was an example of a false multidisciplinary approach. It has been observed already that the notion of property has been a topic of discussion among jurists, philosophers and economists, and from a subjective standpoint, no other subject has been considered from a such a vast interdisciplinary viewpoint; however the hegemony whereby the political approach surpassed all others led the theoretical scholars to reduce the concept of property to a more simple but unreal notion, which takes into consideration only an individual with reference to one thing at one moment of time. For centuries, debate centered on the question of whether or not it is justifiable that only one individual could exercise the wide set of rights, privileges and immunities offered by the legal system to that object at a timeless moment.

In modern legal literature, the law of property, or its civil law counterpart called “droit des biens” in France and “Sachenrecht” in Germany, refer to that part of private law which involves the combination of legal methods used to distribute the utility of goods among individuals⁵⁷. Therefore, it comprises the techniques used to identify the plurality of *jura in rem*: those used to regulate the ownership of a plurality of people concerning the same right *in rem*; those which preside over the transfer of rights; those which concern the protection of rights *in rem*⁵⁸, even though this latter aspect in common law tends to fall under the law of torts.

Recently in the legal literature of common law it has been suggested that property should be reconfigured in three dimensions: the number of owners, the scope of the owners’ dominion and asset configuration.

57. Cf. CHRISTIAN ATIAS, DROIT CIVIL—LES BIENS 1 (1a ed., Paris 1979) (“Le droit des biens . . . fournit l’ensemble des techniques juridiques qui permettent de répartir les utilités des choses entre les personnes”).

58. Cf. A. GAMBARO, IL DIRITTO DI PROPRIETÀ (Milan 1995).

Property rights may be adjusted along any or all of the three dimensions⁵⁹.

Starting from an analysis of economic theory, Herold Demsetz⁶⁰ suggested that a complete theory on property rights must also take into consideration, apart from the problem of externalities, the categories of proximity, productivity and complexity of arrangements⁶¹.

All of the above theoretical approaches are radical departures from the simple paradigm based on one individual, one thing at one time which had dominated studies on property for many years. Moreover, the common vision which connected legal theory to philosophical thought was also abandoned. The fundamental aspect in this regard does not concern leaving behind the simple paradigm in itself, but the mere fact that the dimension of complexity is not the same for all legal traditions and are particularly different in common law and civil law.

A brief comparison may illustrate this observation. According to the European point of view, the plurality of property arrangements derives from positive law and from the realistic consideration that the paradigm of simple property has no place in the legal environment which recognizes such diverse kinds of ownership as urban property, cultural object property, farm land property and so on. The basic assumption seems to be that property rights are the offspring of legislation and legislation in shaping property rights takes into account the general interest in connection with the specific nature of the object of property.

According to American literature, the identification of three dimensions of ownership derives from a theoretical study based on structural methodology. Thus, the dimension of the number of owners revealed the existence of a continuum involving the case of a single owner, community property for married couples, tenancy in common, and joint tenancy, without forgetting that artificial legal entities as well as politically organized communities may own property. The size of the asset configuration emphasizes the fact not only that the optimal size of property may vary from place to place and from time to time, from a single family house in the rural 18th century to an apartment in a condominium located in an urban center today. It also emphasizes that the abstractness of property rights allows them to cover aspects which

59. Cf. A. Bell & G. Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 CHICAGO L. REV. 1015 (2008).

60. See Demsetz, *supra* note 2.

61. A further dimension, type of risk, is suggested but not yet considered.

would be unthinkable with reference to natural things, as in the case of a fee simple divided into two parts: a life estate and a remainder.⁶²

To some extent even recent theoretical approaches still remain prisoners of the longstanding traditional patterns of thought.

In comparative law perspective, or in the perspective of a common western legal tradition that is also the goal of a modern European *jus commune*, it is probably better to explore the possibility of an intellectual framework acceptable to both common and civil law lawyers.

PART III

Things and Persons at the Origin of Property Rights

As stated in previous paragraphs, the more influential formulas not only have failed to capture the richness of property rights, they have also introduced problems greater than those they were supposed to solve. On the one hand, Bierling's theory represents a regression in analytical distinctions because the elimination of the borderline between *jura in rem* and *jura in personam* obscures the differences between two situations ontologically different from one another. Resources which exist even when they do not belong to anyone⁶³, even when they are undetected, demand a certain degree of attention so as to ensure their preservation for the benefit of future generations. Their existence and characteristics are therefore relevant independent of relations among people. The solution to an environmental problem depends not only on the number of those interested in the use of the resource but also on the characteristics of the resource itself. It was on this that the category of *jura in rem* acquired its specificity. Relations between persons imply only analysis of the relationship itself and the various arrangements with which it can be shaped, from hierarchical to contractual. Bierling's theory was fostered in the cultural atmosphere of a 19th century Germany characterized by the idea that only formal logic would create a complete and rational legal system, thus reaching the opposite pole from the historicism of Savigny who refused to extol reason over tradition. In any case, more emphasis should be placed on the fact that the distinction between *jura in rem* and

62. As in the case of the third dimension, the scope of the owner's domain is actually an aspect of asset configuration. It was introduced in order to cope with a classic phenomenon, the reduction and even elimination of *jus excludendi* in the event that a property was destined for public use. Nonetheless, the *dedicatio* is an institution known since the period of Roman law. It allows the establishment of property rights and is not a third dimension of the latter.

63. These types of things are classified as *res nullius* in civil law terminology, but the meaning of this taxonomy has changed in recent times and no longer denotes a type of resource that is legally irrelevant. On the contrary, they are highly relevant.

jura in personam is common to and fundamental in both civil law and common law. In more general terms the historical narrative of the slow dynamics of natural objects⁶⁴ is intermingled with but separated from the historical narrative of the human adventure, with its forms of government, its rituals for the acquisition of power and prestige, its tribulations.

But if the principles and the rules of the law of property do not come from legal theory, where do they come from? One possible answer to this question is that they derive from experience, but it is too easy to connect human experience with the pursuit of economic efficiency. After all, efficiency can be pursued in accordance with circumstances that have not been the same throughout human history. The basis of this approach is theoretically too simple, even if it is not condemned to embracing the dogmatic side of conventional historicism from Vico to Marx. On the assumption that law is made by man, it makes sense to study human history in search of some insights. But in order to prove or disprove anything meaningful, I think it is mandatory to put forward a hypothesis.

I would like to demonstrate that the key aspect of property law lies in its historical formation and not in a simple model of the optimisation of the social welfare.

So far complexity and not uniformity has been the historical background of the law of property. The theories of property that try to reduce a patchwork in which a complex set of felt necessities and prevailing interests have found their accommodation, are probably misleading. Nevertheless if the history of property ideas is a force field and not a straight line, it is a field with boundaries and constant inside, and not a chaotic place of unpredictable economic, social, political choice.⁶⁵

The analysis of property in its various components suggests that it can be organized by reference to two axes, the first related to subjects and the second to objects. In order to establish the logical possibility of dealing with objects it is not necessary that they be of a material nature: This requirement seems to be the product of a historical distortion. From an ontological point of view, the only requirement is that the object can subsist independently from an owner. Thus there is a divergence between

64. It can be misleading to use the expression “natural history”, because if it sometime denotes the study of organisms: their origins, their evolution, their behavior, and their relationships with other species; in many contexts however “natural history” denotes anything which is connected with nature or which uses materials drawn from nature, as in the Latin expression: “*historia naturalis*”.

65. See D. Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development*, ACCOUNTING, ECONOMICS, AND LAW vol. 1, iss. 1, art. 3 (2011).

the notion of object and the concept of right, because the second cannot be conceived independent of an individual. The first is the case of intellectual property, where ideas, novels, music and even books existed before the enactment of copyright legislation⁶⁶. The two axes serve the purpose of defining the boundaries of an area⁶⁷ and the aforesaid area or force field has the function usually assigned in the analysis of complex situations: On the one hand, it defines the area where the operations belonging to the law of property are carried out; on the other hand, it excludes from the same area those rules and principles which appertain to other areas.

The axis of subjects can be conceived in two dimensions: the first considers the individual in relation to holding and can be conceived as a continuum starting from the hypothesis of an individual striving to become a member of a national community, passing through all possible kinds of human groups: family, clan, tribe, associations, partnership, corporations. One of the main elements in this dimension is the right to exclude because it is inherent to the logic of group that the outsiders are totally excluded, but it is important to note that in this dimension to exclude means only to shut out from the group and not necessarily to deny access to a resource. In this first dimension, we find all techniques related to the organization of the group, but in connection with them no participant can claim a *right in rem*. The second dimension regards the individual in relation to the distribution of specific rights to and powers over an object, as in the case of joint tenancy, community property, and trusts. In this second dimension, all techniques related to the attribution of the sticks within the bundle of ownership are grouped together. The two sets of techniques can be functionally equivalent in many contexts, but the second set preserves a *right in rem* for the participants.

It is quite natural to observe that the axis of subjects focuses on the system of property rights in its organizational dimension, and as a consequence the concept of legal relationship seems to be back again. The distinction between internal and external relationships must be kept

66. The key problem is the so-called property in a credit. Common law systems consider that a credit is part of personal property, and mixed jurisdictions such as Quebec have introduced “la propriété du crédit” in their civil legislation. See Y. EMERICH, *LA PROPRIÉTÉ DES CRÉANCES: APPROCHE COMPARATIVE* (Paris, LGCJ 2007). If the credit originated from a deposit, as in the case of a bank account, there is no difficulty in considering its existence independently from the existence of a present owner exactly as a fund can exist even if it is temporarily empty. In other hypotheses the answer must be negative.

67. For a similar concept, but suitable for sociological purposes, see P. Bordieu, *La force du droit. Éléments pour une sociologie du champ juridique*, in *ACTES DE RECHERCHE EN SCIENCES SOCIALES* 3-19 (LXIV 1986).

in mind, however. The external aspect can exist even if the property is held by a single individual in his own interest; indeed even in the case of individual property, the law of nuisance applies. The internal aspect exists only in the case of a plurality of individuals and a single resource.

The axis of objects takes into account the different natural characteristics of objects. The human use of objects is to some extent conditioned by their characteristics, and human uses link objects to individuals. But from a logical point of view, natural characteristics come first, because they exist independently from any human activity.

Any terminology is a matter of linguistic convention and therefore new terminology can be accepted, but traditionally *rights in rem* have been tailored to the uses of things. The law of servitudes is a clear example of this technique.

If the notion of use is central in the analysis conducted on the axis of the object, the subsequent element to be considered is time. In the common law tradition, the time dimension was, and still is, central in the law of real property. In civil law the emphasis placed on unlimited duration of ownership has somehow pushed the time dimension aside, but time immediately regains primary relevance when the entire system of so-called real rights is taken into consideration. From a historical point of view, real rights have been tailored to use in reference to time.

There is a link between the objective status of resources and the right of property.

Actually, the right to property originated from long historical experience as the only guardian of lawful but unorthodox conduct. Family law is the treasure chest of orthodox conduct, considering that it is difficult to separate that which is legal from that which is socially acceptable. The law of contract (and of obligations) is permeated by the general duty of respect for the interests of others⁶⁸, a duty that in many European jurisdictions is known as the "good faith" principle. The law of torts is essentially communitarian,⁶⁹ as is the criminal law from which it originates. Under private law only property remains the sole legal area where an individual can exercise self-expression even by swimming against the stream. This special characteristic of the law of property emerges evidently only during certain phases of human experience and in particular during those historical phases in which, for complex reasons to be re-enacted time after time, individuals extol the community

68. See in a historical perspective, P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (Oxford Clarendon Press 1979).

69. See G. Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519, 521 (1977).

experience. But this source of innovation can be exploited only if jura in rem are contemplated by the legal order.

Therefore, I will attempt to outline some of the major phases of the human adventure to understand the perennial heritage bequeathed by each of them.

PART IV

An Overview of the History of Property Rights and of Their Genesis

For a long time the right to exclude (*jus excludendi*) has been considered almost unanimously as the *sine qua non* of private property⁷⁰. In the absence of a right to exclude others, it would not be possible to talk about property rights.

Few inquiries are provided however on the origins of the right to exclude. In current American literature, reference is still made to Thomas Hobbes, John Locke, and William Blackstone⁷¹, in addition to Hume and Kant⁷². This tendency, considered one of the results of the deep influence which the political/moral tradition has had over legal discourse, is quite surprising because it is well-known that the natural law scholars described the transition from common property to private property under a deep veil of ignorance. All insights that we have of the remote past depend on findings in the fields of archeology, anthropology and human genetics which occurred afterwards.

70. The right to exclude is especially emphasized in the common law tradition. While the Blackstonian legacy emerges in several contexts, it is popular to quote the following sentence by F. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954), identifying private property as property to which the following label can be attached: "To the world keep off unless you have my permission, signed: the private citizen, endorsed: the State". Also the Supreme Court from time to time declares that the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property. *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (quoting *Keiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). The experience of European northern countries is quite different; since the general rule seem to be that notwithstanding the right to own property "everyone shall have access to nature in accordance with *allmansrätten*". *Allmansrätten* are not really traditional customary rights, rather the arrival point of a legal evolution. See G. WIKTORSSON: DEN GRUNDLAGSSKYDDADE MYTEN, A COMPREHENSIVE ESSAY AND STUDY RE THE LAUNCH OF THE "ALLEMANSRÄTTEN" IN SWEDEN (City Univ. Press 1996); F. VALGUARNERA, ACCESSO ALLA NATURA TRA IDEOLOGIA E DIRITTO (Torino, Giappichelli 2010).

71. See THOMAS HOBBS, LEVIATHAN 2 (Basil Blackwell 1947) (1651); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Cambridge Univ. Press, rev. ed 1963, Mentor Paperback) (1690); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1765-1769).

72. See J.E. Krier, The Evolution of Property Rights: A Synthetic Overview (Univ. of Mich. John M. Olin Ctr. for Law & Econ. Working Paper Series, Working Paper 91, Oct. 2008), <http://law.bepress.com/umichlwps/olin/art91>.

At this point I believe we should use the knowledge we now possess to trace the origins of the right to exclude.

The question of appropriation dates back to the period prior to the existence of mankind; however, hunting and gathering societies considered issues related to appropriation as being of secondary importance. In fact, the sharing of captured animals or of fruits concerned the internal organisation of the group⁷³ which acted as a legal body and legitimately took possession of them. It can be observed not only that hunting in reserved territory created forms of property⁷⁴ where exclusivity concerned only selected utilities, but also that property was allocated to the group and not to the single individual. The original forms of appropriation were not, and could not be, individualistic. According to anthropologists who studied African customary law, individuals considered the following aspects vitally important: the position within the group that controls the right of access to the reserved territory; the right to gain possession of certain utilities; the involvement in the decision-making process regarding customs related to territorial resources; and the right to impose prerogatives.⁷⁵ Indeed it is not completely correct that hunting and gathering societies thereby introduced a primitive form of property, because two key aspect of the modern concept of property were missing: appropriation of all the utilities of the territory was unthinkable in that that hunters were not interested in utilities other than wild animals; and it was missed also the individualistic character of the decision-making process under which the destination of a thing is the result of a physiological process not mediated by language, as opposed to a deliberative process in which ability in the use of the language is of paramount importance.

If we apply modern legal categories, the age-old problems of mankind had little to do with property rights, but concerned group organisation and the related problems of governance⁷⁶.

73. See R. SACCO, *ANTROPOLOGIA GIURIDICA* 263 (Bologna 2007).

74. See Demsetz, *supra* note 11, at 347-59. French and Italian law make a terminological distinction between a reserve—*riserva*—or land reserved for specific activities, i.e., *reserve de chasse* (terre ou domaine consacré à la chasse des personnes privilégiées) and a property (propriété).

75. E. le Roy, *L'apport des chercheurs du LAJP à la gestion patrimoniale* (2007), <http://www.acaj.org/leroy/texte1.htm>.

76. However, taking legal categories seriously is unusual. During the twentieth century, the comparison between socialist and capitalist economies focused on property, that is, the issue concerning property, even though manufacture was entrusted to collective entities and thus an intelligent analysis should have compared structures of governance concerning the owners and not the property.

This aspect was destined to last. Nowadays, private property refers to all arrangements in which property is vested in groups of private individuals other than public entities. It is generally recognised that the property of enterprises is a matter of organisational law⁷⁷, even if the related problems are styled in term of property. Material civilization changed radically in agricultural society, where crops such as wheat in the Middle East, rice in Central Asia, and corn in Central America were raised⁷⁸. The agricultural cycle requires that he who prepares the land, sows and waters the field, etc., be the same individual who takes possession of the harvest, while all others are excluded; that is, they must be prohibited from having access to the land. Of course this exclusion is justified only in reference to the cultivation period; by consequence it is not a year-long requirement and certainly does not concern the period following the harvest. Moreover, the agrarian technique of rotation can leave some fields in common use as pasture. But all these exceptions are marginal and the truth is that agricultural societies cannot coexist with societies based on hunting and gathering⁷⁹.

Therefore, not only is appropriation expressed in the form of exclusive property without reservation of selected utilities, but the survival of the social structure also depends on the status of property-based appropriation. In other words, the choice of agricultural activity is also a choice in favour of types of appropriation which tend to require exclusivity on agricultural land. Agricultural use, in particular intensive farming, highlights the rival uses in the enjoyment of tangible property and transmits the aforesaid to the idealized type of property which captured universal attention. What remained to be decided was if the right to exclusive enjoyment depended on title or on possession.

Nevertheless, the first solution prevailed owing to the cultural background which characterized the Middle East around 8,500 BC when, as far as Western legal tradition is concerned, agricultural society was founded⁸⁰. At that time, this population was aware of the techniques

77. See H. HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (Belknap Press of Harv. Univ. Press 1996).

78. Natufian Culture (14,000-11,100 BC) used wild plants as a source of food. The passage to a completely agricultural economy obviously was slow and evolved over time. See L.L. CAVALLI-SFORZA, P. MENOZZI & A. PIAZZA, *THE HISTORY AND GEOGRAPHY OF HUMAN GENES* (Princeton Univ. Press 1994); see also *STORIA E GEOGRAFIA DEI GENI UMANI* 403 (Milan 1997).

79. See for this statement, CAVALLI-SFORZA, MENOZZI & PIAZZA, *supra* note 78; J. DIAMOND, *GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES* (N.Y. 1997).

80. See DIAMOND, *supra* note 79.

related to the sacralisation of the territory⁸¹, most probably originating from the evolution of the shamanic procedure for taboos⁸². It was dangerous to infringe a taboo, as illustrated in the episode regarding Remo⁸³. The exclusion was connected to magic and determined the assignment of the right of exclusion following a ritual ceremony for the transfer of title. Since this problem had been resolved through sacral means⁸⁴, possession was limited to the root of title⁸⁵ and the predominantly agricultural use of land guaranteed that *jus excludendi* was associated with ownership⁸⁶.

Land property was not individualistic, however. Land in ancient Egypt was considered property of the king, while land in the Sumerian territory was property of the temple⁸⁷. The concept of individual property was developed much later on and was not the prevalent form of land possession. Even under Roman law, which is frequently praised for the introduction of a compact form of individual ownership, the so-called *proprietas ex jure quiritium* was in use in a small area surrounding the city of Rome. Throughout the immense Roman Empire, real property was organised in numerous legal forms, sometimes so distant from the ancient paradigm as to be named by Gaius *possessio vel usufructus*⁸⁸. From a historical standpoint, landed property has mainly always been a complex group of highly fragmented individual rights. The consolidation of the dominion was a chimera studied by scholars of natural law, but the prototype of compact property did not appertain to land, but rather to the movable property that was a product of the Neolithic revolution and the introduction of handcraft and commerce. But even in this regard it is important to emphasize that compact

81. See J. BOTTÉRO & S. NOAH KRAMER, *LORSQUE LES DIEUX FAISAIENT L'HOMME. MYTHOLOGIE MÉSOPOTAMIENNE* 80 (Paris 1989) (where the explanation and non-religious sense of mythology is given).

82. See W. BURKERT, *CREATION OF THE SACRED. TRACKS OF BIOLOGY IN EARLY RELIGIONS* 93 (Harv. Univ. Press 1996).

83. See T.P. WISEMAN, *REMUS, A ROMAN MYTH* (Cambridge Univ. Press 1995).

84. Reference to the sacred returned in the beginning of the bourgeois society. The *Déclaration des droits de l'homme et du citoyen* states under art. 17: "La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité."

85. Only canon law departed from this solution. See *supra* notes 34, 36 and accompanying text.

86. It was also associated with the *Gewere* of the old German law, but this association strengthens the historical sketch, because the rule *Jahr und Tag* (year and a day) was linked with the magic of spring rituals.

87. See J.-L. HALPERIN, *HISTOIRE DU DROIT DES BIENS* 7 (Paris, Economica 2008).

88. See LEVY, *WEST ROMAN VULGAR LAW. THE LAW OF PROPERTY* 40 (Phila. 1951) ("The disintegration and abandonment of those limited and clearly defined types of *jura in re* which once made up the very structure of the law of property?").

property which assigns all rights to only one individual was not an application of Locke's theory. Neither the farmer nor the craftsman were considered natural owners of their products; rather the compactness of movable property resulted from the needs of commerce and trade. Undoubtedly, whoever purchased a sheep or an artifact intended to buy the entire property. The tablets found in Mesopotamia and also in Ebla⁸⁹ which refer to property demonstrate that the purchaser's intent was satisfied 5,000 years ago⁹⁰. For obvious reasons movable property is by far more individualistic in character than real property and by consequence the general paradigm of property depends also on the respective weight given to the two different forms of wealth. A manufacturing and commercial society is more inclined to stress the paradigm of individual ownership than is a rural society. The compactness of property destined for trade was probably at the origin of the distinction made by Gaius between *res corporales* and *res incorporales* and most probably marked the difference between urban property (the allodium of Blackstone) and rural property. The different ideal structures of property represented a chapter in the story of the divergence between city and countryside. This divergence may be amplified by taking into consideration the fact that, with respect to European civilization, the relation between city and countryside is not exactly one of domination, because rural development had already taken place, but of work specialization which acknowledged the city as being the center of trade⁹¹, thus leaving intact rural civilization⁹². This partially explains the eclipse of the paradigm of commercial property in Europe during the Middle Ages, when the lands, were subject to intensive farming⁹³. Land was therefore the most natural focus of jurists, thus creating a clear dividing line with commercial trade relations which were subject to the law of obligations. Nevertheless, the essential factor which

89. See E. SOLLBERGER, ADMINISTRATIVE TEXTS CHIEFLY CONCERNING TEXTILES (ARET VIII, Herder Roma 1986).

90. This does not imply that the Market Overt rule is efficient, but only that the interest of bona fide purchaser to buy the entire set of rights over an object has been recognized in ancient time. On the efficiency of the rule, see M. Barak, *Augmenting the Value of Ownership by Protecting It Only Partially: The 'Market-Overt' Rule Revisited*, <http://ssrn.com/abstract=368280> or doi:10.2139/ssrn.368280.

91. See S.R. Epstein, *Introduction*, in S.R. Epstein (ed.), TOWN AND COUNTRY IN EUROPE, 1300-1800, at 1-29 (Cambridge Univ. Press 2001).

92. See G. DUBY, RURAL ECONOMY AND COUNTRY LIFE IN THE MEDIEVAL WEST (Univ. of Pa. Press 1998).

93. This was the fundamental intuition of H. PIRENNE, MOHAMMED AND CHARLEMAGNE (Dover Publ'ns 2001); H. PIRENNE, HISTOIRE DE L'EUROPE, DES INVASIONS AU XVII^E SIÈCLE (Paris Alan-Bruxelles N.S.E. 1936); see also R. HODGES & D. WHITEHOUSE, MOHAMMED, CHARLEMAGNE, AND THE ORIGINS OF EUROPE (Cornell Univ. Press 1983).

contributed to making property in land the center of attention while also making reference to the nature of compact rights was an ideological element. Expanding societies need to face another problem related to property. This is vacant land, that is, land which has been taken by force from other populations. The Greeks, the Romans and the Europeans—starting from the period of the “geographical discoveries”⁹⁴—had to face the problem of assigning vacant land and the way they solved the issue from a legal standpoint influenced the manner in which the fruits of the land remaining at home were shared.

Owing to centuries of agricultural background, these societies perceived the problem of legitimacy in taking vacant land by referring to a tacit but decisive assumption, on the basis of which whoever legitimately declares “this land is mine” not only asserts that the land is only his and belongs to nobody else, but also that said land will continue to be his. Following his death it will be handed down to his children and to the children of his children, who may potentially transfer it to others voluntarily or rent it, without affecting the validity of the original property. The notion of property was thus hybridized with the ideas of land and family and thereby received the gene of eternity.

For millennia the generally accepted justification for gaining title to vacant land was based on first occupancy, and land was considered vacant if not used for agricultural purposes⁹⁵. The theories which describe the modes of expansion of the Indo-European population as a gradual migration of agricultural workers which starting from 7,000 BC left Anatolia to reach England⁹⁶ approximately 3,500 years later, probably provided the mental predisposition for regarding uncultivated land as vacant land. In this regard, the consequential migration of European populations towards North America can be interpreted as a continuation of what began many thousands of years before. A certain path

94. For this chapter of European expansion and colonialism, see F. Braudel, *THE WHEELS OF COMMERCE* vol. II of *Civilization and Capitalism 15th–18th Century* (Univ. of Cal. Press 1992); D. ARNOLD, *THE AGE OF DISCOVERY, 1400-1600* (Routledge 2002).

95. It is worth noting that the justification was similar to the first occupancy theory. The main shortcoming of this theory is that it provided a moral claim to property that is incompatible with the desire to live in peace, having its roots in victory. This shortcoming has passed unnoticed for centuries.

96. See C. RENFREW, *ARCHAEOLOGY AND LANGUAGE: THE PUZZLE OF INDO-EUROPEAN ORIGINS* (London, Johathan Cape 1987); C. RENFREW, *LOOT, LEGITIMACY AND OWNERSHIP: THE ETHICAL CRISIS IN ARCHAEOLOGY* (Duckworth, Londra 2000); CAVALLI-SFORZA, MENOZZI & PIAZZA, *supra* note 78 (suggesting a model of demographic diffusion substantially in line with the wave of advance model suggested by Renfrew, who put forward another proposal for the expansion of Indo-European peoples: see C. Renfrew, *Time Depth, Convergence Theory and Innovation in Proto-Indo-European: “Old Europe”; as a PIE Linguistic Area*, 27 *J. INDO-EUR. STUD.* 257-93 (1999)).

dependency can explain the complex mentality, in some cases hidden, acquired during this process, which in turn may explain the preferred theoretical formulations of the issue.

On moral grounds this justification falls through whenever there is an act of violence at the origin of the occupancy which forced the previous owners to move away. If the ancestors of the present owners had fought to acquire the property title, then the aforesaid title could be destroyed by anyone who fought for it and won⁹⁷. In ancient civilisations this was not a problem because property in the colonies depended on the destiny of the new community, that is, it depended on its ability to push back the invaders. That is to say it was commonly understood that the legitimacy of property rights was connected with the persistence of the legal order that has established them; if the legal order disappears, the legitimacy of property disappears because it can't stand on the base of a natural legal order. In some other historical situations, the legitimacy of first occupancy was buttressed by religious beliefs. It was not necessary to be the first inhabitant of a territory; rather, it was better to be the first representative of the true religion in order to be authorised to spread it. The nexus with legitimacy in acquiring private property remained to some extent obscure, but the State or the Church was ready to intervene, thus ensuring the private owner a derivative title.

A more complete theoretical justification was advanced only by the Natural Law School and within that school the best-known solution has been advanced by John Locke who asserted, in brief, the following: a) God confers to every individual the right to use his body and his energies as he wishes; b) in the same way, every individual is master (*ergo*: owner) of the fruits of his work; c) therefore a farmer is legitimately entitled to take possession of the fruits of his harvest; d) regarding land, since it has been given by God to mankind so that the latter could farm it (and therefore not to the natives who live on hunting and gathering), the European farmer shall legitimately take possession of the land, provided that enough land remains for the future generations of farmers.

Locke's theories have been analysed so many times in the past and need not be repeated. I would like to limit myself to underlining how easy it is to explain Locke's argument in the light of historical experience and how difficult it is to justify the same on logical or moral grounds. It is after all quite obvious that Locke's arguments and all similar arguments put forward are formulated on the basis of a conception that a

97. See J. Nedelsky, *Should Property Be Constitutionalized? A Relational and Comparative Approach*, in VAN MAANEN & VAN DER WALT, *supra* note 5, at 417.

person is an entirely subjective being and has very limited social attributes,⁹⁸ an assumption that can be conceived only on very limited grounds.

As always legal mentality is influenced by cultural as well as environmental factors. The search for moral legitimacy as a foundation for property of vacant land was a cultural aspect; but economic needs created by the evolution of technology also pushed in the same direction. The latter emphasized the need, perceived by early modern economic studies, to reorganize the management of land by granting all rights, power and faculties to one individual: the individual owner.

During the long historical period from the Neolithic revolution to the Industrial Revolution, know-how was both limited in scope and available to many, thus the subdivision of land did not cause widespread inefficiencies. Those who controlled a resource used it in the usual way, as in the past. When the revolution of productive technologies took place in the 19th century, which encompassed agriculture as well, the diverse means of acquiring know-how and the propensity towards risk became significant. It therefore appeared necessary to define an ownership structure which permitted those who had more technical knowledge and greater inclination towards risk to purchase compact property in order to make the most of those qualities, managing a greater number of resources and above all enabling them to pay a higher price than others did. The tragedy of the anticommons⁹⁹ was certainly embedded in a scenario characterized by significant differences in management skills and willingness to accept risk. The spreading of relevant but limited entrepreneurial skills was a factor that determined the breakdown of the Malthusian circle. It encouraged legislative reform which re-compacted property rights in line with the outdated model of movable property. As in common law, this could have occurred through reforms involving a selection of rights, powers, faculties, privileges and immunities connected to ownership. For example, this was the strategy embodied by English legislation in 1925¹⁰⁰ for reform of the estates on land in the UK. Since Europe for centuries had been an agricultural continent, diverse

98. See R. Zucker, *Unequal Property and Subjective Personality in Liberal Theories*, in *RATIO JURIS* 87 (1993); K. Raes, *Individualist Subjectivism and the World of Property: On the Interrelations Between Concepts of Value and Concepts of Ownership*, in VAN MAANEN & VAN DER WALT, *supra* note 5, at 91.

99. See M.A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 620 (1998). Some aspects of the tragedy of the anticommons can be traced back to the works of Quesnay and Turgot in the XVIII century.

100. See R.E. MAGARRY & H.W.R. WADE, *THE LAW OF REAL PROPERTY* 1157 (4th ed., Sweet & Maxwell 1975); A.H. MANCHESTER *MODERN LEGAL HISTORY* 324 (Butterworths 1980).

legal situations originated from agricultural affiliations and from numerous other sources, such as laws, customs, local regulations, case-law rules, and diverse legal opinions were in force and they became the target of reformers. The idea of regrouping rights which might allow the enjoyment and disposal of assets under one individual thus required an intermediate step consisting in the prior regrouping of law sources. As is well-known, the codes of the Enlightenment had the same function. The most significant expression of this reconstruction came under art. 7 of the *loi sur la réunion des Lois civiles en un seul corp, sous le titre de Code civil des français*¹⁰¹, later known as the Code Napoléon, which stated: “À compter du jour où ces lois sont exécutoires, les lois romaines, les ordonnances, les coutumes générales ou locales, les statuts, les règlements, cessent d’avoir force de loi générale ou particulière dans les matières qui sont l’objet desdites lois composant le présent code.” This form of legislation created a subtle and enigmatic tie between property and code which set aside the specific precepts of each code. Once the structure of the law sources was reduced to unity, the unity of ownership was then established by making reference to the simple paradigm in which only one person and one object at a time were contemplated. The celebrated formula of article 544 French civil Code is the most well-known example of such a paradigm.¹⁰²

Nonetheless, the sense of the idea of compactness remains a function of the reasons for which it was introduced. According to the French model offered in the Code Civil, these reasons are mainly ideological and thus the division of property rights, apart from easements, is tolerated only as a transitory event. If the reason is implicit in the model of mercantile property, then the underlying needs only appear at the moment of exchange and thus the only limit to the division of land interests coincides with the costs of the transaction, that is, the costs borne by the potential purchaser in order to obtain all necessary information as to how the related right is structured. Nevertheless, the need for circulation of mercantile property reveals the drawbacks of any drastic limitation on the owner’s prerogative to restructure his interest. Mercantile property has always been subject to subdivisions in order to be used as a guarantee and in this regard three technical solutions can be identified: the creation of a specific real right such as a pledge or mortgage, a solution which existed in the European codes of nineteenth

101. Lois 30 ventose an XII, 21 Mar. 1804.

102. “La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu’on n’en fasse pas un usage prohibé par les lois ou par les règlements.”

century¹⁰³; the creation of special property serving as a guarantee as occurs in Germany and also in France thanks to legislative reform¹⁰⁴; or a security interest pursuant to the model under art. 9 of the UCC¹⁰⁵, which minimizes the costs of information and for this reason is considered to be the most efficient of all¹⁰⁶. The current use of property for guarantee purposes and security interests demonstrate how the compactness of property has been a short-term paradigm based on uncertainty.

If legal concepts must represent the positive law in force, the image of compact and absolute individual property as a specific tangible asset which makes up the object has never made much sense; property has always been defined by a variable group of limited rights. While the image of the bundle of rights is commonly accepted in the US experience, it must be pointed out that the prevailing European view of property as a variable set of limited rights obtains the same result.

Once ownership is conceived as the result of a variable set of limits, the image of a single type of ownership is untenable. Therefore, if a plurality of ownership situations exists, analysis of property rights requires intellectual instruments able to capture the complexity of legal arrangements and their translation into specific situations.

What we should recall is that the law of property has inherited the complexity of group organization from the most ancient cultural heritage of mankind, namely, the problem of the right to exclude inherited the agricultural revolution; the need for compact property rights owing to the development of trade; and the need for their fragmentation coming from the development of finance. The law of property, however, has always maintained its reference to an external object whose existence can be independent from any subject.

It has been proven that only in respect to such external object is it possible to let the individual apply individual knowledge to put in place a better use of external resources.

Risk is indeed a dimension of the normative system of property, and also a limitation, once it is understood that we are not systematically allowed to risk the interests of others.

103. Mortgage on property (Hypothèque mobilière—Movable Hypothecs) was reintroduced in the Civil Code of Québec in articles 2696-2714.

104. See Ord. n° 2006-346, 23 mars 2006, des sûretés réelles, art. 2367 code civil.

105. See E.M. Kinninger, *Introduction*, in E.M. Kinninger (ed.), *SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW 6* (Cambridge Univ. Press. 2004).

106. See R. GOODE, *LEGAL PROBLEMS OF CREDIT AND SECURITY* (3d ed., Thomson Sweet & Maxwell 2003); H.C. Sigman, *Security in Movables in the United States—Uniform Commercial Code Article 9: A Basis for Comparison*, in *SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW*, *supra* note 105, at 54.

Nowadays no one can claim a sole and despotic dominion over the external things of the world, but things are still there and they claim the effort of the jurist to understand man's relation to them.