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Faculty of Law

Maastricht University

From “classical” to modern European property law?

Prof. Sjef van Erp

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From “classical” to modern European property law?

_Sjef van Erp_¹

I. Introduction

In this paper I will examine some fundamental aspects of European property law.² Do European property law traditions share a common model of property law and, if this question is answered affirmatively, could this model be a foundation upon which European harmonisation and unification measures can be based? My thesis will be that the European property law traditions share a “classical” model of property law. A critical first analysis of this classical model will be offered, followed by an evaluation of the model from the perspective of an evolving European property law.

Property law deals with the acquisition and distribution of wealth (possessions) in a society. As wealth can only be created if the existing legal framework that regulates its acquisition and distribution provides for stability and security, property law focuses on long-lasting relations. This is one of the major structural distinctions between property law and the law of obligations, especially contract law. Contractual relations are more often than not of short duration, although of course some contractual relations and in particular complex arrangements such as large construction projects frequently may be of a long-term nature.³ Defined in legal terms someone’s wealth is that person’s patrimony. A patrimony has a positive side and a negative side. The positive side of a person’s patrimony consists of the

¹ Professor of civil law and European private law, Maastricht University, the Netherlands. President of the Netherlands Comparative Law Association. I would like to thank the participants of workshops in Bremen (Centre of European Law and Politics) and Hamburg (Max Planck Institute for comparative and international private law) for their comments during a presentation of my ideas for this paper.

² This paper was written in 2006 and is to be published in a collection of essays.

rights a person has against all other persons with regard to objects that exist in the world around him (someone’s “property” or “possessions”). What can be an object of property law depends upon what the legal system recognises as such. These objects can be corporeal, such as goods and land, or incorporeal, such as claims and ideas. Viewed from a negative side, a person’s patrimony consists of the debts a person has toward other persons. Debts are generally owed to a specific other person. Debts (or “obligations”) are the correlative of a right that another person has, but this right is of a personal nature in the sense that the duty attached to that right is only owed by one person. It is, therefore, interesting to see that civil law systems do not use the distinction between the various types of rights to create a classification within private law. With regard to personal rights the civil law focuses on the duty side and calls this area “the law of obligations”. It is with regard to rights against the world that the civil law focuses on the right. This area is called “property law”. In a creditor-debtor relationship, the focus is on the duty or the “debt” (the negative side of the creditor-debtor relationship) in case contractual problems arise, but the focus is on the claim (the positive side of the creditor-debtor relationship) if the relationship is looked at from the perspective of being an object of property law. Non-performance of a debt is a contractual matter; assignment of a claim is a property question. It could therefore be said that property law regulates the positive side of a patrimony and the law of obligations regulates the negative side. Of course, property law burdens other persons, but these burdens are not considered to be part of the negative side of someone’s patrimony. The burdens are considered to be general and create duties for everyone. They are not specific enough to be attributed to a particular patrimony.

It could thus be said that property law is the legal basis for the creation (acquisition and distribution) of wealth. For this creation of wealth it is necessary that property law be aimed at establishing stability and legal security. Property law, therefore, concentrates on
long-standing legal relationships and, given the impact of property rights as rights against everyone else, focuses on limitation of these rights. Because of these two reasons, this area of the law is generally considered to be more static than dynamic. In contract and tort law this is completely different. These areas are seen as more dynamic than static. Contract law has seen a development from a so-called static “classical” model to a dynamic model in which legal relationships, which develop over time, have become the starting-point for analysis. Pre- and post-contractual liabilities have been recognised and changed circumstances may lead to an adaptation of the contractual relationship. Tort law is frequently seen as the expression of policy choices which have to be made between existing interests: which of these interests should be protected and, if so, to what degree? The right (and limitations of this right) to privacy is a good example of this approach. These policy choices may change, just as the interests to be protected may change. It seems that comparable dynamics cannot be found in property law. The effect was that property law became petrified or, as Libchaber has phrased it so eloquently, modern property law has entered a stage of “belle endormie”.

This static image of property law can be found in all property law traditions in Europe. Upon first sight, when looking at the common law, the civil law in its various styles (French, German and Scandinavian legal tradition), the transition systems in Central and Eastern Europe and the mixed legal systems (Cyprus, Malta and Scotland), the various approaches to property law and the differences that exist between them seem to be written in stone.

This view of property law, however, is rather deceptive, as I have indicated in my chapter on property law in the Oxford Handbook of Comparative Law. First of all, within the

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various property law traditions far-reaching developments can be found, which as such justify a re-examination and rethinking of existing policies, principles, rules and concepts. I refer to what Vandevelde with regard to U.S. law has called the “dephysicalisation” of property: the increasing importance of intangible objects of property law, such as goodwill.\(^7\) Secondly, when looking at these property law traditions from an external comparative viewpoint, it becomes clear that divergence at the level of rules and concepts is often not so deep-rooted as might be thought upon first analysis. Furthermore, a comparative study of the changes within the property law traditions shows that these changes are often the result of phenomena, which can be found everywhere in Europe. What Vandevelde has written concerning U.S. law about the dephysicalisation of property law, can also be applied to the European systems of property law. An example is emissions trade. The European Union, in order to implement the Kyoto Protocol, has set up a scheme for emission trading, which has been implemented in the laws of the Member-States.\(^8\) Each legal system had to answer questions such as: what is an emission right (“allowance” in European Union terminology), can emission rights be “owned”, how should emission rights be transferred, should this transfer be of a causal or of an abstract nature (in other words: should its validity be dependent upon the existence of a valid legal ground or not)?\(^9\)

In order to discover the changes in property law, I propose an analysis as has been put forward by the famous Oxford scholar Patrick Atiyah with regard to contract law. By

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\(^9\) Article 3 (a) of the 2003 directive gives the following definition:

“For the purposes of this Directive the following definitions shall apply:

(a) ‘allowance’ means an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive”.

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describing and analysing what Atiyah saw as the “classical” model of contract law and comparing it with the model he saw appearing in modern case law, legislature and legal literature, he revealed the dynamics of contract law.\textsuperscript{10} At the same time his analysis made clear that these dynamics could be found in all Western systems of contract law. Following his example I will be asking myself (1) whether a “classical” model of property law can be found as the underlying idea upon which the various property law systems in Europe are built and, (2) whether, in case such a classical model exists, modern property law differs from that model and, if so, in which respects. It will be clear that what follows can only be a proposal for further research, given the constraints of this contribution.

II. A classical model of property law?

(a) What is meant by “classical” model?

When authors discuss the “classical” model of contract law, the word “classical” is used in a very specific way. It refers to how contract law was perceived during the codification era in Europe, in other words: the 19\textsuperscript{th} century and especially the beginning of the 19\textsuperscript{th} century. Generally, the characteristics of this classical model of contract law are rooted in two of the ideals of the French Revolution: freedom and equality. The ideal of fraternity did not really play a role at that time, or, to put it differently, freedom and equality were considered to be the expression of fraternity. Fraternity meant that everyone’s freedom and equality would be assured.\textsuperscript{11} These ideals led to the perception of contract law as being embedded in the will of

the parties, irrespective of their social status and bargaining power. In my view a “classical” model can also be found with regard to property law.

A major question, of course, is whether this classical model can be found in both civil and common property law. Civil property law is heavily influenced by the ideals (and ideology) of the French Revolution and its rejection of the feudal system. Under the feudal system a tenant held land from a lord, thus at the same time creating a bond of allegiance and a property relationship (“estate”) between them. Before the French Revolution common and civil law had shared roots in this feudal system. After the French Revolution the feudal system was abolished radically on the continent of Europe, but remained in the countries with common law. Although in these countries the feudal system gradually underwent several changes, and in fact now functions as the property law systems on the continent of Europe, the feudal system is still the historical foundation of the common law of property, as it can be found in England, Wales and Ireland. A more traditional type of feudal property law system still exists on the Channel Islands (Guernsey and Jersey). On the continent of Europe the feudal system of property law was replaced by a system based on Roman law that had been developed further by European legal science. The feudal system has also been abolished in the mixed jurisdiction of Scotland by the Abolition of Feudal Tenure etc. (Scotland) Act, 2000

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Like on the continent of Europe, the feudal estate of *dominium utile* was replaced by a Roman law based concept of simple or outright ownership.

Given the, certainly from a conceptual viewpoint, revolutionary changes on the continent of Europe at the end of the 18th and the beginning of the 19th century, I will start by outlining the classical model of property law from a civil law perspective. This will be followed by a brief analysis as to whether certain aspects of this model can also be found in modern common property law. It will be clear that such an analysis, given the nature of this essay, can only present a first impression, but still an impression that might be helpful in creating a common understanding of the essential characteristics of the European property law traditions.

(b) Basic characteristics of the classical model: civil law

The basic characteristics of the classical model of property law from a civil law perspective can be found in a highly interesting article written by Terrat, in the *Livre du Centenaire* commemorating 100 years French Civil Code (1904). In this article he gives an overall view of the development of property law in France since the enactment of the French Civil Code, emphasising the strength of the code’s underlying ideas. The property law model upon which the Civil Code was founded (typically a “classical” model of property law) was, very much like the classical model of contract law, an expression of the ideals of freedom and equality.

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16 See articles 1 and 2 of the act: Section 1 (Abolition on appointed day): “The feudal system of land tenure, that is to say the entire system whereby land is held by a vassal on perpetual tenure from a superior is, on the appointed day, abolished.” Section 2 (Consequences of abolition): “1) An estate of *dominium utile* of land shall, on the appointed day, cease to exist as a feudal estate but shall forthwith become the ownership of the land and, in so far as is consistent with the provisions of this Act, the land shall be subject to the same subordinate real rights and other encumbrances as was the estate of dominium utile. (2) Every other feudal estate in land shall, on that day, cease to exist. (3) It shall, on that day, cease to be possible to create a feudal estate in land.” The “appointed day” was 28 November 2004.

In property law freedom and equality meant, first of all, freedom from the feudal system of land holding and abolishment of any special treatment based upon status in society (nobility, clergy, citizen). “La Révolution”, writes Terrat, “qui avait affranchi la personne, voulut aussi affranchir la propriété (…)”.\(^{18}\) It also meant free transferability of property and severe curtailing of ways to create a mainmorte (inalienable property), e.g. by limiting the possibilities to create a fideicommissum (testamentary disposition under which, after the death of the first appointed heir, a second heir inherits the property). The desire to be free from the feudal system explains why servitudes, especially personal servitudes (usufruct), were looked upon with some suspicion. At all costs, the revival of feudal duties, be it directly through the (re)creation of manorial rights or indirectly through the law of servitudes, should be avoided. Remarkably enough, as a result, equality and freedom came into conflict here. On the one hand, equality meant that private parties should not be allowed to freely create duties vis-à-vis third parties, especially duties demanding from third parties to do something (positive duties). Vassals no more!\(^{19}\) Freedom, on the other hand, meant that such a creation of duties, even of positive duties, was in the hands and at the discretion of private citizens. The fear of a revival of feudalism was, however, so strong that equality prevailed over freedom. In other words: the freedom of the parties had to be limited in the interest of equality to avoid any possible return of the feudal system. As a consequence freedom of contract did not apply with regard to property rights. As a consequence, property law had to be distinguished from contract law. In order to decide whether a legal relationship could be qualified as contractual (with the ensuing freedom of contract) or proprietary (with as a consequence severely curtailed freedom to create rights and duties) a separation between the law of contract and the law of property had to be created. In Germany this separation became so strict that it led to the doctrine of the “Eingeständigkeit des Sachenrechts”. In the Netherlands it led a leading case \(\text{– quite}\)

\(^{18}\) Terrat, Du régime de la propriété, p. 335.
remarkable for a civil law system that such a fundamental question had to be dealt with in case law! – in 1905, in which the Netherlands Supreme Court laid down that the law of contract and the law of property were different in nature and therefore had to be distinguished with great care.  

This separation not only affects the law of property and the law of contract, but also the law of tort. The separation between the law of property and the law of contract cannot be circumvented by the use of tort law. Let me give an example based upon the law of the Netherlands Antilles (in this respect the same as Dutch law). A seller of land had not included in the contract of sale a duty to pay part of the proceeds of a plantation to the heirs of the original beneficiary of this clause (“heirs Boyé”). This duty was a so-called “chain” or perpetual clause, which had to be included in each contract of sale. In fact, the purpose of the clause was to create a ground rent, but it had not been established as a property right. The new buyer (the Island of Curaçao) refused to pay the duty and demanded a formal declaration from the court that this was justified. The heirs Boyé claimed that, because the Island of Curaçao should have known about the clause, the island was liable under tort law (negligence) to pay the amount of the duty. The Netherlands Supreme Court ruled that, although a tort claim was possible, courts had to be very careful in their analysis. In particular, courts had to avoid giving proprietary effect to a clause that was of a contractual nature. It could be said that the Supreme Court refused to bypass the *numerus clausus* principle by only allowing the enforcement of contractual clauses vis-à-vis third parties under tort law within strict limits. If, and this is another characteristic of the classical model of property law, parties would have wished to create rights against the world (‘*erga omnes*’), they would have had to fulfil certain mandatory conditions. First of all, only a choice could have been made from a list of property

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rights and, within the list, the content of the various rights could only be modified – if at all! – to a very limited degree. Secondly, these rights had to be made public, either through registration (land), through possession (movables) or some different mode of information (claims). These two filters, created to decide whether a right is personal or proprietary in nature, resulted in two leading principles of property law, which are still applied: the *numerus clausus* principle and the principle of transparency. The *numerus clausus* principle means that the number and content of property rights is limited and that the way in which these rights are created, transferred and extinguished is laid down in mandatory format. The transparency principle has two aspects: publicity and specificity. If third parties are to be bound by a right the creation of which happened without their consent, they must at least be able to gather information on such a right (requirement of publicity). If it were unknown what the object is of a proprietary right, third parties would still be insufficiently informed about such a right. Consequently, this object has to be clearly defined (requirement of specificity). Non-fulfillment of the transparency principle would violate the ideals of freedom and equality and would therefore be unacceptable. General mortgages as were known in the feudal era, covering a person’s whole possessions, were therefore suspect, even more so if they would not have been published (so-called “sûretés occultes”).

A further characteristic of the classical model of property law is the concept of ownership as the most comprehensive right possible and “*inviolable et sacré*”, which, because of individual freedom, was seen as a natural right belonging to each individual. All other property rights give their holder a lesser content than ownership and are seen as burdening the right of ownership (“*iura in re alinea* “). The very moment these so-called “limited real rights” extinguish, the owner regains all the rights, privileges, powers and immunities – to

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borrow the terminology from Hohfeld – attached to being an owner. This latter phenomenon is called the “elasticity” of ownership. It could, therefore, be said that the concept of ownership was the basis from which property law derived. This is why Wiegand can say that the *numerus clausus* of property rights is “vorprogrammiert” in this approach to property rights.

When the two filters of the *numerus clausus* principle and the transparency principle have been passed and it has become evident that a particular legal relationship is of a proprietary nature, the civil law applies certain ground rules. These ground rules also belong to the classical model of property law. The first ground rule is the *nemo dat* (or *nemo plus iuris*) rule. A person cannot transfer more rights than that person has. The second rule is the *prior tempore* rule: a property right previously established has priority over a later property right. The exception is ownership itself, the concept of ownership being the foundation upon which the fabric of property law is built. Although ownership is the oldest right, still later limited real rights have priority over ownership. Thirdly, limited rights have priority over fuller rights. A right of mortgage is a limited real right that burdens the right of ownership. Although the owner is at the apex of the property law system, he has to accept that certain of his rights, privileges, powers and immunities have been given away to someone else with the

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24 Wiegand, Die Entwicklung des Sachenrechts, p. 117.

25 For a further analysis of these ground rules see: S. van Erp, European and national property law: Osmosis or growing antagonism?, p. 16 ff.

power to enforce her rights against the owner. Finally, and this is the fourth ground rule, once it has been established that a right is a property right the law will give such a right special protection. An example is the right given to the owner to (re)claim his property from anyone who is holding it without title ("reivindicatio").

Other characteristics of the classical model of property law concern (1) the subjects who can be owner and (2) the objects of ownership. During the period in which this classical model was developed, i.e. before the Industrial Revolution, the focus was on the "citoyen". The citoyen is an individual citizen with immovable property that allowed him to take part in commercial (and political) activities. The role of legal persons as owners remained underexposed. The highly individual nature of ownership can also be seen when looking at the French rule on co-ownership, laid down in article 815 Civil Code, that "nul n’est tenu de rester dans l’indivision".27 Everyone should have the right to terminate co-ownership and become a free individual owner again. As a consequence of this individual approach to property law the role of the family became more limited, although in the law of succession still certain family members were given a minimum share in the estate of a deceased.

Finally, and this can still be seen in many legal systems, the classical model of property law focused on corporeal objects, not on claims and intellectual property. Furthermore, the focus was not only on corporeal objects, but also particularly on immovable property, especially land. This is certainly also true for the common law, which still traditionally makes a distinction between land law and personal property law, but it still also applies to civil law systems. Although it is a starting point for civilian legal analysis to state that the law of property is a unitary system of rules, nevertheless a distinction is being made between the objects of property rights. The rules on delivery are an example. Different rules apply to different objects (land, movables, claims). However, any sharp distinction between

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27 Terrat, Du régime de la propriété, p. 343. Article 815 C.C. reads: “Nul ne peut être contraint à demeurer dans l’indivision et le partage peut toujours être provoqué, à moins qu’il n’y ait été sursis par jugement ou convention.”
family property (particularly land) and property acquired by a person’s own activities disappeared after the French Revolution, although this distinction can still be seen in some matrimonial property law systems. In matrimonial property law a regime may apply, which reserves to the individual spouse all the property that belonged to him or her before the marriage, including what this spouse receives as a result of succession and gift, and which creates common ownership with regard to what was acquired during the marriage.

(c) Basic characteristics of the classical model: common law

It will be obvious that the classical model, outlined above, does not apply immediately and completely to the common law. First of all, the common law is still – albeit more in theory than in practice – rooted in the feudal system. Secondly, property concepts have not been derived from Roman law. English law still uses the concepts of estate and tenure in real property law, although this is different in personal property law. The idea of ownership as the most absolute right, at the apex of a system of property rights, can also not be found in the common law.

Nevertheless, some common features can be found. First of all, also in the common law a distinction is made between property rights and personal rights. The principles of *numerus clausus* and transparency also apply with regard to common property law, as well as the ground rules of *nemo dat, prior tempore*, limited rights have priority over fuller rights and the special protection given to property rights. It can be debated whether the freehold (fee simple) is or is not functionally equivalent to the civil law concept of ownership and the same question can be asked with regard to several other property rights under the common law.

For the time being, however, I would only like to stress that, although the classical model of

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29 With regard to the applicability of the *numerus clausus* principle see W. Swadling, Property law: general principles, p. 206 ff.
property law is most clearly visible in the civil law, this does not mean that some of the most basic characteristics of the this model are absent in the common law.

III. A critical first analysis of the classical model

To a large extent the classical model of property law still is model that reasonably well explains the fundamentals of the civil (and to some degree also the common) law of property. There are several reasons for this. An important ground for the continued existence of the model is caused by its strength and effectiveness. Property law deals with long-standing relations. These long-standing relations are the legal foundations upon which economic wealth can be built. If private ownership is abolished and thus the classical model of property law is abandoned, as happened in so many countries after the rise of communism, wealth is lost. Although the state acquired wealth, private persons lost so much wealth that the losses were greater than the gains. The state proved, furthermore, to be incapable of producing the same wealth as private parties dealing with one another on a market. The classical model of property law proved to be more efficient and more able to maximise wealth than the Marxist model. From a comparative perspective it became apparent that the classical model of property law was simply the better model. This was not the first time that the classical model proved to be better than another model. It should not be forgotten that the classical model of property law was the result of a rejection of the ancien régime and the feudal duties that belonged to it. The French Revolution led to a disenfranchisement of the nobility and growing prosperity for ordinary citoyens (particularly: middle class citizens). It proved to be creating more wealth than under the previously existing feudal system and also wealth that was also more justly distributed (although a truly fair distribution only came with the rise of the
welfare state). To summarise in one sentence: the classical model of property proved to be a highly effective model.

There also reasons at a more legal-dogmatic level, which explain the continued strength of the classical model of property law. As we have seen, the starting point of the model is a strict separation between the law of contract and the law of property. All European legal systems, albeit in varying degrees, still make a distinction between the law of property and the law of contract to create a balance between the old ideals of equality and freedom. In the law of contract freedom is the starting-point, of course within the limits set by mandatory law, public policy, good morals and good faith. In property law, binding formats are the starting-point, hence freedom is limited and mandatory law is prevalent. In his book “Eigenständiges Sachenrecht?” Füller has made it very clear that even under German law the law of property cannot be completely separated from other parts of private law. For that reason he calls the difference between the law of obligations and the law of property a “Scheindualismus”. However, some separation will be unavoidable in the light of the ideals underlying the classical model of property law, which until now have been supported broadly. The question then is, how far such separation should go and on this matter national systems of property law may and will differ.

The leading principles and ground rules which are at the heart of the classical model of property law can still be found in the European property law traditions in spite of all the social, economic and cultural changes in European societies since the 19th century. It could, therefore, be argued that, irrespective of the way in which these principles and ground rules have been worked out in technical rules, also at a legal-dogmatic level the model has proved itself to be resilient.

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Given the aversion against the feudal system as it existed under the “ancien regime”, it is hardly a surprise that property law systems following the classical model were aimed at giving hard and fast inflexible rules. As a result property law systems tended to petrify. When bearing this in mind, it can also hardly come as a surprise that property lawyers have great difficulty rethinking basic policies, principles, rules and concepts. This is true at a strictly national level, but even truer at a supra-national level. If new regional or global initiatives are taken to harmonise or unify certain parts of property law (especially the law on real mortgages and personal property security interests), national property lawyers become hesitant. They are concerned about maintaining the coherence of their system to avoid instability and uncertainty.32 Given the great value of certainty and stability, this approach is useful and makes sense. If, nevertheless, rejecting changes has as its main cause unwillingness to rethink existing policies, principles, concepts and rules then this approach should be abandoned. Also property law undergoes an evolutionary and thus gradual change, caused by changing social, economic, cultural and political conditions. The words of Libchaber in his article on recodification of property law in France, published in Le Code Civil 1804 – 2004, Livre du Bicentenaire, should in this light be reflected upon with great care:

“Pourquoi faudrait-il renouveler une matière, qui est comme entrée dans le sommeil aussitôt après la promulgation du Code civil? Pourquoi faudrait-il la réveiller, alors aucun des indicateurs habituels ne manifeste son inadaptation aux besoins sociaux? (…) Le défaut de rajeunissement qui se repère dans toutes les dimensions du droit des biens ne saurait apparaître comme le reflet de sa perfection, mais comme le symptôme de son épuisement.”33

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32 Global and regional initiatives to harmonise or unify the law frequently receive a critical response by national lawyers. A major reason for this is that these initiatives are taken at a level where national lawyers have less influence than if these initiatives were taken at a national level. National lawyers are also less informed about global or regional developments. As a consequence national lawyers often feel excluded. Cf. M. Kenny, Constructing a European Civil Code. Quis custodiet ipsos custodies, Columbia Journal of European Law 2006, p. 775ff. It will, therefore, be crucial for the development of a European property law that national lawyers get more actively involved in the harmonisation and unification process at a European level. This is a task, which not only rests upon the European institutions, but also upon national lawyers themselves. Inertia during the drafting process can never justify rejection of European initiatives afterwards.

33 Libchaber, La recodification du droit des biens, p. 297 and p. 298.
Libchaber then goes on to consider what he calls the sclerosis of property law, advocating a rethinking of existing concepts, objects of property law and existing techniques. In this way unity in legal thinking could again be reached between the “general” law of property as it can be found in the Civil Code, the “special” rules on movable assets and claims, intellectual property law and commercial law. Concerning existing concepts Libchaber defends the view that the concept of individual ownership should be reexamined. Ownership in the hands of legal persons, especially large corporations, is of a different nature than ownership in the hands of a private individual. Also the unitary concept of ownership, developed as a reaction against fragmented ownership as it existed during the feudal era, should be reconsidered. Ownership is frequently used for security purposes, resulting in a division of rights between the “legal” owner (the creditor) and the “economic” owner (the debtor). Ownership can also be transferred for purposes of management, thus creating a trust. At this moment the French legislature, recognising this development, is considering the introduction of a civil law type of trust (“fiducie”). With regard to objects Libchaber points out that the role of immovables as a source of wealth has been steadily declining, whereas the importance of movables and claims is growing. Furthermore, new objects of property law have been developed, such as the “fonds de commerce” (the business enterprise) and information as such

34 Libchaber, La recodification du droit des biens, p. 302. High value movables are a good example of “special” rules on movables. Although these objects are movable (aircraft, railway rolling stock, space objects), they are nevertheless being treated as if they were immovable. This is done to avoid applicability of the rules on possession for the transfer of these movables and the creation of security interests. Possession is seen as an inadequate tool to provide the required information to third parties. For that purpose, as can be seen with regard to immovable property, a registration system is established. I refer to the Unidroit Convention on International Interests in Mobile Equipment (Cape Town, 2001); see the web site of Unidroit: http://www.unidroit.org/.

35 Libchaber, La recodification du droit des biens, p. 302 ff.

36 Proposition de loi adoptée par le Sénat instituant la fiducie, transmise par M. le Président du sénat à M. le Président de l’Assemblée Nationale, le 18 Octobre 2006, document no. 3385. For the dossier legislatif see: http://www.assemblee-nationale.fr/12/dossiers/institution_fiducie.asp. The bill defines the fiducie as follows: “Art. 2011. – La fiducie est l’opération par laquelle un ou plusieurs constitutants transfèrent des biens, des droits ou des sûretés, ou un ensemble de biens, de droits ou de sûretés, présents ou futurs, à un ou plusieurs fiduciaires qui, les tenant séparés de leur patrimoine propre, agissent dans un but déterminé au profit d’un ou plusieurs bénéficiaires.

Art. 2012. – La fiducie est établie par la loi ou par contrat. Elle doit être expresse. 

Art. 2013. – Le contrat de fiducie est nul s’il procède d’une intention libérale au profit du bénéficiaire. Cette nullité est d’ordre public.”
(trade secrets). Derivative instruments (options, swaps etc.) could perhaps be added. Finally, new techniques are needed in the light of these changing concepts and objects. Libchaber mentions as an example of a new technique the growing importance of real subrogation: the status of objects, which replace other objects. In his view the sclerosis of property law can particularly be seen when looking at the traditional sources of property relationships, also considering the decline of the immovable as value.\textsuperscript{37} Certain types of limited real rights have lost much of their meaning, giving the changing nature of what is seen as valuable. To add an example: In the Internet technology business, creativity (and hence: potential intellectual property) is of far greater value than traditional sources of wealth. When providing security for a loan, the law of real mortgages will hardly be relevant here, as more often than not the premises in which the business is located will not be owned by the entrepreneur, but rented. In the light of the foregoing, it cannot come as a surprise that the decline of the immovable as value is seen as the second major cause of sclerosis in property law. Nevertheless, although property law shows sclerosis in the details, in Libchaber’s view the overall structure of property law still is fairly stable with ownership as its \textit{“poutre maîtresse”} or \textit{“clé de voûte”}. In other words: until today the classical model of property law has been a workable model.\textsuperscript{38}

\textbf{IV. Conclusion}

The main characteristics of the 19\textsuperscript{th} century classical model of property law can be summarised as follows. The starting point is a clear separation between the law of obligations (especially the law of contract) and the law of property, in other words between personal rights (rights against a particular person) and absolute rights (rights against the world). Positive duties burdening third parties cannot be created through the law of contract and are

\textsuperscript{37} Libchaber, La recodification du droit des biens, p. 298 ff.
\textsuperscript{38} Libchaber, La recodification du droit des biens, p. 303.
avoided in the law of property. The freedom of parties to create rights vis-à-vis third parties is limited by two leading principles: the *numerus clausus* principle (limitation of number and content of absolute rights) and the transparency principle (information requirements: publicity and specificity). Once it has been established that a particular right can be qualified as a property right (i.e. an absolute right with effect *erga omnes*), certain ground rules apply: the *nemo dat* rule, the *prior tempore* rule, the rule that limited rights have priority over fuller rights and special protection rules, such as the right to reclaim property (in civil law systems, to give an example, the *reivindicatio*). The model focuses on land law, disregarding movables and claims. This classical model of property law is most clearly visible in the civil law tradition, but its basic characteristics as described above can also be seen in the common law tradition.

In light of the changes, which occurred, after the classical model had been developed (the Industrial Revolution, the rise of movables and claims as a source of value and the dephysicalisation of property) the critical question can be asked whether this classical model still explains property law adequately. We have seen that Libchaber in an in-depth study discussed the “sclerosis” of property law, referring to concepts, objects and techniques of property law that are no longer used. In my view his analysis is correct. Property law systems have great difficulty adapting to such new objects as time-share arrangements (periodically returning “ownership” of a second home for a limited period), emission rights (the right to pollute), virtual property (domain names0 and what Reich has called the “new property” (social security).39 Although Libchaber mentions that ownership has remained the central concept of property law systems, still the civilian concept of ownership is undergoing fundamental changes. I already mentioned the proposals to introduce a civil law trust in French law. Such a civil law trust has not only already been recognised in such mixed

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jurisdictions as Scotland and South Africa, but also in other civil law systems. In Scotland the abolition of the feudal system and the introduction of “simple” or “outright” ownership did not have any impact on the recognition of these trusts. It could further be questioned to what degree property law really can and should be independent from the law of contract. To create a truly closed system of property law, which would not be dependent upon the uncertainties of contract law with its rules on void and voidable legal acts and its provisions concerning dissolution in case of non-performance, the law of obligations and the law of property will have to be watertight compartments. This is the principle of abstraction, which can be found in several areas of German property law. An example is the transfer system under German law. In German property law it is a starting point for legal analysis that the invalidity of an underlying sales agreement does not result in invalidity of the transfer. A further example can be found in German mortgage law. In case of the “Grundschuld” paying off the loan does not lead to an extinction of the security right. The policy behind this principle of abstraction is the promotion of stability and security in business transactions. Füller has shown that the strict independence of the German property law system can be seriously questioned. In French law a strict independence never really existed. Examples are the consensual system of transfer (a sales contract results in an immediate transfer of ownership of the object sold) and the accessority principle (connecting the security right with the underlying loan). Nevertheless, also in French law no complete open connection exists between the law of contract and the law of property. With regard to immovable property, a sale of land will not be effective against third parties in good faith, unless it has been registered. In the new French law on security rights, the accessority principle no longer applies to reverse mortgages (“hypothèques rechargeables”).

A possible return of the feudal system as it existed under the ancien régime is no longer is considered to be a realistic fear. This paves the way towards a more flexible numerus
clausus principle and accept a, what I have called, quasi-numerus clausus.\textsuperscript{40} Parties should be given more freedom to give shape to the property rights traditionally recognised and, albeit under strict conditions, they should be given the freedom to create new property rights. These rights do not necessarily have to be effective against the whole world, but could be effective against certain interested third parties. This is the background of the rules on qualitative duties in the Netherlands Civil Code.\textsuperscript{41} Property law will then become borderline law, a legal area in which traditional property law is further developed through contract and tort law.

The classical model of property law, when brought back to its leading principles and ground rules, still applies today, but without the rigour that sometimes was so characteristic of its application in the past. This trend towards relaxation and flexibility is a conditio sine qua non for the development of property law in an era characterised by regional and global economic integration, with its resulting osmosis between national, European and global property law.

\textsuperscript{40} S. van Erp, A numeros quasi-clausus of property rights as a constitutive element of a future European property law?, Vol. 7.2 Electronic Journal of Comparative Law, (June 2003), \texttt{http://www.ejcl.org/72/art72-2.html}.

\textsuperscript{41} See article 6:252 Neth. C.C.