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A UNIFORM LAW OF PROPERTY FOR EUROPE – IS IT PLAUSIBLE?

As the process of European integration progresses, the need increases for the harmonisation of legal networks within which the economies of EU countries can flourish. It is generally accepted that all branches of law, particularly private law must be unified (Meijknecht, 2002: p. 125; Radwański, 2004: p. 6). To advance this aim, the EU issued directives and regulations to supplement the principles developed by the courts and international tribunals which strongly influence the legal systems of the EU countries (Meijknecht, 2002: p. 39).

The first discussions on the future of EU private law date back to 1989. In that year the European Parliament adopted a resolution to start working on a European Civil Code (ECC) with the help of private law experts (Ch. Von Bar, 2000: p. 43). In 1994 the Parliament adopted a revised version of the same resolution and commissioned a research project entitled "Discrimination based on the country of origin in private law of the EU countries, opportunities and the necessity of creating a European Civil Code" (Ch. Von Bar, 2000: p. 43). The publication of this study inspired further research on the topic.

A conference held in Scheveningen in 1997 focused on the preparation of a European Civil Code and motivated a group of scholars to establish a Study Group to prepare a Civil Code and to continue the work of the European Commission on Contract Law (E.Hondius, A. Wiewiórkowska – Domagalska, 2002: p. 28). During a summit meeting in Tampere in 1999, the European Council launched an appeal for a comprehensive analysis of the need to harmonise the law of the European Union in order to overcome difficulties in conducting civil proceedings properly (Ch. Von Bar, 2002: p. 308). A summit in Laeken, in 2001 confirmed this appeal, but no detailed analysis was undertaken (Ch. Von Bar, 2002: p. 308). Nevertheless the events described above illustrate that the Ministries of Justice of the EU members, as well as the countries which in turn presided over the EU, showed a continued interest in the ECC project (Ch. Von Bar, 2000: p. 43).

Results have already been achieved in the field of the law of obligations. In 2001, the European Commission issued a statement on European Contract Law, while the European Commission on Contract Law published a document entitled the Principles of European Contract Law. This publication contains a set of general contract rules and forms the basis for regulations proposed by individual Working Groups. Since new institutions must constantly be catered for and require constant revision of general rules and the introduction of new rules and principles, it is accepted that the principles of European Contract law are not unalterable but constantly subject to change and revision (Ch. Von Bar, 2000: p. 43).

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In 2001 The European Parliament adopted a resolution on the unification of private and commercial law.[2] Full support was given to the harmonisation of private law and a vision for achieving uniformity was outlined (E.Hondius, A. Wiewiórkowska – Domagalska, 2002: p. 27).

Although the need to create a uniform private law for the EU countries through the preparation of a European Civil Code is widely acknowledged (Meijknecht, 2002: p. 40), the methods to be employed, the extent to which uniformity must be sought and the time within which the codification must be completed are still contentious issues. Several groups have already started to work on this project namely a study group on the ECC chaired by professor Ch Von Bar of Osnabrück, a group chaired by prof. O. Lando, who focuses on European contract law, a group chaired by prof. Gandalfi from Pavia, the Bussani – Mattei group in Trento and the Koziol – Spier Group in Vienna (E. Hondius, A. Wiewiórkowska-Domagalska, 2002: p. 28; Radwański, 2004: p. 40).

Consequently, the debate on whether there is a need for a Uniform European Civil Code has now shifted to a consideration of whether such a Code would preserve the basic principles and institutions of private law. On his question, I completely agree with professor Z Radwanski who contends that in view of the casuistry and inconsistency of current EU law, such an outcome is highly unlikely. Moreover, EU provisions are so numerous that it is difficult to discover a common basis or principle (Radwański, 2004: p. 8–9). However, although the case law emanating from the Strasbourg Tribunal is contradictory, it should be possible to construe some general principles of private law from these decisions.

An international survey showed that it is extremely difficult to foresee the time scale for the completion of an ECC. The survey also confirmed that the so-called soft rules of the law of contract, namely the desirable default rules that are applicable if the parties to the contract do not agree otherwise, can be prepared in a relatively short time (Radwański, 2004: p. 9; W. Posch, 2003: p. 200), the more so because formulating the general principles of contract is essential and crucial (Meijknecht, 2002: p. 42). However, a formulation of the general rules of property is as plausible and as crucial as the formulation of the rules of contract. One can question whether the current obsession with the law of contract at the expense of the law of property is justified.

However, it is not difficult to agree with von Bar that the ECC must be prepared in stages. If the ECC were to contain, like the civil codes of individual European countries, a comprehensive statement of the entire private law of Europe, its completion would be postponed indefinitely (Ch. Von Bar, 2000: p. 45).

Even so, it is of paramount importance to devise and formulate a conceptual model for such a Code and to lay down the general principles on which the provisions of the Code are to be based. The achievement of this aim could be facilitated by regard to the very active legislative process in the new member states of the EU, which is aimed at uniformity with EU law and the adaptation of their laws to new economic principles.

P. Meijknecht gives the following five reasons why the formulation of such general principles is crucial:

1) they would be the first step in formulating a Uniform European Civil Code;
2) the parties would be able to choose these rules as general provision or as proper law;

[2] Resolution COM (2001)398 – C5-0471/2001 – 2001/2187 (COS).

3) these rules may provide the courts with a model where the proper law is ambiguous or does not provide for a particular situation;
4) they may be a source of inspiration to national legislatures; and
5) research and education may benefit from them (Meijknecht, 2002: p. 42).

In my opinion the conceptual model of the Code should not deal with matters related to family law (Ch. Von Bar, 2000: p. 46). In Poland these matters have since 1964 been dealt with in a separate Family and Guardianship Code and not like in other European countries in the Civil Code. The same applies to the law of succession. I do not, however, agree with von Bar that the law relating to immovable property should not form part of the ECC and should be treated in separate legislation (Ch. Von Bar, 2000: p. 46). It seems inconsistent that matters such as the law of obligations and real rights in movables, in particular security rights in movables, should be dealt with in the ECC while the more important branch of property law relating to immovables, should be left outside in splendid isolation.

Von Bar's view corresponds with French concepts and doctrine which developed on the basis of Napoleon's Code. The Code contains the following substantial differences between the legal regimes of movables and immovables. First, the proof of ownership of movables is manifested through possession, whereas the proof of ownership of immovables usually requires a written document of title. Again, the value of movables is treated as insignificant (a reminder of the medieval age: *res mobilis, res vilis*), whereas immovables are considered to have a special value. Finally claims relating to movable and immovable property are entertained in different courts and different factors are taken into account in private international law matters (R. Savatier, 1947: p. 302–303).

Such a sharp differentiation between the consequences which flow from the treatment of movable and immovable property has not been widely accepted in Europe. The German and Austrian Civil Code, for example, contain general definitions of things as objects of real rights covering both movable and immovable property. Although the Codes also contain separate definitions of immovable property, they fit movable and immovable property into the same scheme and do not attach as many legal differences between them as French law does. (see § 90 BGB and §§ 94 BGB, 293 ABGB respectively).[3]

It should be noted, that the notion of immovables is defined differently in various legal systems. The German, Austrian and English (Law of Property Act 1925. s. (205) (1) ix) (J. Stevens, R.A. Pearce, 1998: p. 3) legal systems perceive immovables as parts of land and their fixtures. The Polish Civil Code defines immovables as land and, if special legal provisions exist, also buildings and parts of buildings (art. 46 and 46^1). Meanwhile in French law regulations concerning immovables are very casuistic (art. 517–524), and the following types of immovables are listed in the Code of Napoleon (art. 517) (R. Savatier, 1947: p. 302–303; H. Dyson, 2003: pp. 13–14):
1) things immovable by nature,
2) things immovable on account of the purpose, for which they are employed,
3) things immovable because of the thing in relation to which they are utilised (art. 517 FCC).

Therefore, in French law immovable property denotes not only land and buildings, but also wind or water mills built on pillars or constituting a fixture of a building, un-

[3] Bürgerliches Gesetzbuch, RGB1.S. 195, BGBL.III 400-2 Allgemeines bürgerliches Gesetzbuch, JGS Nr 946.

collected fruits of the soil (earth) and of the trees, wood from the forest for as long as trees have not been cut down, animals possessed by the lessee, when their possession was derived from the lessor together with the possession of land, water pipes in the ground, or even sculptures placed in purpose-built niches, etc.

In the light of the above it seems important to work towards a uniform definition of immovable property for Europe to establish a conceptual mould by which matters related to these issues can be solved.

In the sphere of conflict of laws, real rights relating to land and the transfer of land is usually governed by the law of the location of the property (*lex rei sitae*).[4] This solution has also been adopted in the sphere of Polish private international law. This is undoubtedly a legacy of the medieval territorial principle according to which law is unconditionally applied in the territory, where it is in force (M. Pazdan, 1999: p. 27), as opposed to the personal principle according to which a person is governed by the law of his or her domicilium. This principle was also accepted by the Postglossators who distinguished between the status of persons (*statuta personalia*) and the status of objects (*statuta realia*) as well as by the Dutch school of thought (M. Pazdan, 1999: pp. 28–29), which held the view that every legal right is by its very nature territorial. It is obvious that currently, the status of immovable objects is most frequently determined by the *lex loci rei sitae*.

In Polish private international law, as has already been mentioned, there is a visible difference in the treatment of obligations concerning movables (contractual status) and immovables (object status). This solution is not original, as it is employed in the conflict of law provisions of most countries (M. Pazdan, 1999: p. 136). States like to protect their territorial integrity and are usually reluctant to "lose" land through transfer of immovable property to foreigners. This is confirmed by the fact that most countries have enacted provisions which restrict the purchase of land by foreigners and by the level of social involvement in debates on this matter preceding the accession of new countries to the European Union. Denmark, Sweden, and Austria still enforce restrictions on the purchase of land by foreigners and the adoption of a transition period in Portugal has not brought about a meaningful liberalisation of their restrictive provisions.

In the light of the above the solution advocated by von Bar, namely to postpone the regulation of rights pertaining to immovable property to the distant future and to deal only with rights in movables is flawed for the following reasons.

Firstly, once a homogenous regulation of contract law has been accepted, one cannot overlook the fact, that many transactions will, and already do, concern immovables. The property market which was, until recently a local market has become globalised (E. Kucharska-Stasiak, 1997: pp. 29–38; S. Kalus, 2009). This process is directly influenced by, on the one hand, the increase in tourism paired with the institution of time sharing, and on the other hand, by the operation of the Treaty of Rome which ensures the free movement of people, goods, capital and services. The implementation of the directive 88/361/EC (24 June 1988) on the execution of art. 67 of the Maastricht Treaty and currently of art. 56 of the Amsterdam Treaty requires that the restrictions on the purchase of land by foreigners in European countries should be relaxed. The free movement of employees from country to country requires that they should be allowed to purchase land and buildings in the country where they work in order to fulfil their

[4] §31 Bundesgesetz vom 15.06.1978 über das internationale Privatrecht(IPR – Gesetz).

housing needs. The free flow of capital stimulates establishment of businesses outside home countries and creates the need for entrepreneurs to acquire land and commercial property. Moreover, since land usually has a high market value and stimulates investment it is difficult to understand why regulations concerning it should not be included in an ECC. Finally, since contracts are the main source by which real rights in immovable property are created, it would be unsound not to include contracts by which rights in immovable property are created in the proposed ECC.

A further reason why real rights with regard to immovable property should be regulated without delay, is the fact that harmonisation in the field of securing debts through real rights is considered a priority. There is no logical reason why the harmonisation of security rights should include only rights over movables and not over immovables or why institutions such as mortgage and the German *Grundschuld* should be omitted. Since these security rights are widely utilised by mortgage banks all over Europe as an integral part of their business, their omission cannot be justified. This is particularly important, since existing real security rights differ even in countries which have similar legal systems. In Germany, for example, the *Grundschuld* has almost completely substituted mortgages in banking, whereas in Austria mortgage banks still exclusively secure claims by way of mortgage.

The above arguments should convince people that the harmonisation of the European law of property should include immovables. Whether such harmonisation should take place at the same time as the unification of the law of contract is another matter. My personal opinion is that this may be premature. However, it is imperative that work should begin immediately on a framework in which the unified provisions of the law of property can be accommodated in future. The formulation of such ground rules should not be postponed. The more EU law influences the private law of its member States, the more urgent it becomes to establish a uniform terminology for all the member states. Instead of regulating small parts of the law in great detail, the codification effort should now concentrate on wider issues such as the interdependence of legal institutions and a formulation of the basic concepts which underpin the law of contract, the law of torts (delict) and the law of property. Only then will it be possible to regulate the various areas of the law in more detail (Ch. Von Bar, 2002: p. 311). Ch. von Bar compares the need for unification to the need of introducing a common currency (Ch. Von Bar, 2002: p. 311).

The following issues should be subject to harmonisation:

1) the notion of ownership –
2) the limits within which the right of ownership can be exercised – The basic issue here, particularly in the light of the decision of the Strasbourg Tribunal, is the extent to which the state may, through its acts of parliament, limit the right of ownership, without violating the protection given to ownership by European Convention on Human Rights. The protection accorded to ownership since the French Declaration Of Human and Citizen Rights (1789), is not complete. Most contemporary legal systems allow for special circumstances in which ownership may be limited or expropriation may take place. Some jurisdictions (the German and the Swiss CC) contain a general clause on expropriation, while other jurisdictions contains a casuistic list of circumstances which justify expropriation (Polish law). All systems allow expropriation only if just compensation is paid. Another important issue in the light of decision of the Strasbourg Tribunal concerns environmental law and the prob-

lem of balancing the interest of a private individual in exercising the right of ownership without any limitations and the public interest to guarantee the right to live in a clean and harmoniously developed environment. This is of particular importance in respect of immovable property where planning law plays an important role and where private civil law provisions are supplemented by administrative decisions.

3) the content of ownership – there is a noticeable tendency to treat ownership not only as a right, but also as an obligation. This can be seen in the protection accorded to tenants against landlords and in the financial duty on the part of owners of units in an apartment ownership building to contribute to expenses in respect of the common property on threat of a compulsory sale of their unit by the community of owners.

4) In my opinion property rights with regard to immovable property which are more widely enforceable than contractual rights should, for now, be regulated uniformly regardless of whether they are personal or real rights. This seems sensible in view of the fact that special provisions often equip contractual rights with greater effectiveness characteristic of ownership protection. A good example is the protected rights enjoyed by residential tenants. Other examples are the Polish perpetual usufruct, the German *Erbaurecht* or the French *bail a construction* on a parcel of land. It is therefore not conclusive, whether a given right is, in a given legal system, a real, or a personal right namely a right enforceable and effective *erga omnes* or only effective *inter partes*. The crucial quality of the right must be that it is also effective against the future buyer of the property.[5] Such a unification would be very meaningful since it would lead to the extraction of rights from the legal networks within which they function in order to give them a special meaning outside a given society. This would be especially significant, especially if the right concerned can fulfil its function in different societies. In Poland the right of perpetual usufruct is constantly connected with the past socialist economic system. This invariably obscures the positive aspects of the right which provides local authorities with income and gives them a measure of control over the time and the kind of development envisaged by developers of public land.

In view of the above, the harmonisation of the European law of property to form part of a Uniform European Civil Code should not only include the regulation of movable property but should definitely be extended to include the regulation of immovable property. The fact that the process may prove to be difficult and frequently obstructed by national interests in land and property proves that the sooner work starts the better.

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[5] Compare English easements, rentcharges, charges by way of legal mortgage, miscellaneous charges, rights of entry.

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