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# **Vorlesung / Course**

*Einführung in die Rechtsvergleichung*  
***Introduction to Comparative Law***

**Winter term 2018-2019**

**<http://www.eastlaw.uni-kiel.de>**

17.10.2018: Basic questions and structures of comparative law  
24.10.2018 Structures and methods of comparative law  
*31.10.2018: Holiday*  
07.11.2018: Structures (cont'd). Methods of comparative law  
14.11.2018: Methods (fin.). Legal families (overview)  
21.11.2018: German legal family (deutscher Rechtskreis)  
28.11.2018: French legal family  
05.12.2018: Anglo-American legal family  
12.12.2018: The legal systems in Northern and Eastern Europe  
19.12.2018: Legal systems in Asia  
09.01.2019: Religious laws, in particular Islamic law  
16.01.2019: Contract law I (Vertragsrecht)  
23.01.2019: Contract law II  
30.01.2019: Torts law (Deliktsrecht)  
**06.02.2019: Property law (Sachenrecht)**  
13.02.2019: Civil procedure



# Property law (overview)

- **Notion of property: Eigentum, Vermögen**
- „Full“ property, „limited“ proprietary (property) rights/rights in rem
- **Systematic position of property law in the legal system.** Constitutional, EU and international law dimension (human rights, investment protection etc.).
- The specific cases of expropriation and privatization

# Legal sources of property law

*Examples: art.711 French Civil Code vs. Sec. 929 German Civil Code (BGB)*

- Germany, Austria, Switzerland, Estonia
- France: Code Civil
- Scandinavia: different specific statutes
- Eastern Europe: e.g. Russia (Civil Code, special Codes)
- UK: Common law, equity, statutes (e.g. Law of Property Act 1925)
- USA: Common law, equity, statutes, in particular UCC

**Unification of law: DCFR** Book VIII Acquisition and loss of ownership of goods, Book IX Proprietary security rights in movable assets, Book X Trusts

# DCFR Book VIII Acquisition and loss of ownership of goods

## Chapter 1: General provisions

### Section 1: Scope of application and relation to other provisions

VIII. –1:101: Scope of application

(1) This Book applies to the acquisition, loss and protection of ownership of goods and to specific related issues

### Section 2: Definitions

VIII. –1:201: Goods

*“Goods” means corporeal movables. It includes ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases.*

VIII. –1:202: Ownership

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

VIII. –1:204: Limited proprietary rights

## Chapter 2: Transfer of ownership based on the transferor’s right or authority

### Section 1: Requirements for transfer under this chapter

**Section 2:** Effects VIII. – 2:201: *Effects of the transfer of ownership*

## Chapter 3: Good faith acquisition of ownership

## Chapter 4: Acquisition of ownership by continuous possession

## Chapter 6: Protection of ownership and protection of possession

# Constitutional Guarantees of Property

Questions for comparison of e.g.  
Article 14 GG and Articles 8, 35 Russian  
Constitution?

- 1) How are the guarantees of property in both Constitutions structured in comparison?
- 2) Is „property“ defined, and if so, how?
- 3) What are the limits to property protection under the two Constitutions?

# German Basic Law (Grundgesetz) of 1949

## Article 14 [*Property – Inheritance – Expropriation*]

- (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 dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

# Russian Constitution of 1993

## First Section. Main Provisions - Chapter 1. The Fundamentals of the Constitutional System

- Article 8** 1. In the Russian Federation guarantees shall be provided for the integrity of economic space, a free flow of goods, services and financial resources, support for competition, and the freedom of economic activity.
2. In the Russian Federation recognition and equal protection shall be given to the private, state, municipal and other forms of ownership.

## Chapter 2. Rights and Freedoms of Man and Citizen

- Article 35** 1. The right of private property shall be protected by law.
2. Everyone shall have the right to have property, possess, use and dispose of it both personally and jointly with other people.
3. No one may be deprived of property otherwise than by a court decision. Forced confiscation of property for state needs may be carried out only on the proviso of preliminary and complete compensation.
4. The right of inheritance shall be guaranteed.

## Questions for comparison of the structure of regulation of property law in Germany, France and Estonia?

- 1) Where is property law positioned in the three Codes/Acts? Compare the context with non-property matters.
- 2) What issues does property law regulate under the three Codes/Acts?
- 3) What are the parallels and differences between sec.929 BGB and art.711 French Civil Code?

# **German Civil Code (Bürgerliches Gesetzbuch)**

## **Book 3 Law of Property**

Division 2 General provisions on rights in land

Division 3 Ownership

Title 1 Subject matter of ownership

Title 2 Acquisition and loss of ownership of plots of land

## **Title 3 Acquisition and loss of ownership of movables**

Subtitle 1 Transfer

### **Section 929 Agreement and delivery**

**For the transfer of the ownership of a movable thing, it is necessary that the owner delivers the thing to the acquirer and both agree that ownership is to pass. ...**

# **Code civil (France)**

**Book I On Persons**

**Book II On Goods and Different Modifications of Property**

**Book III On the Different Ways How to Acquire Property**

## **GENERAL PROVISIONS**

**Article 711**

**Ownership of assets is acquired and transmitted by succession, by donation inter vivos or testamentary, and by the effect of obligations.**

**Book IV On Securities**



## Law of Property Act

[Translation](#)

[Authentic text](#)

[Content](#)

Issuer: Riigikogu

Type: act

In force from: 23.03.2014

In force until: 31.07.2014

Translation published: 31.03.2014

Select

## Law of Property Act<sup>1</sup>

Passed 09.06.1993

RT I 1993, 39, 590

Entry into force 01.12.1993

[Amended by the following legal instruments \(show\)](#)

**Part 1**  
**GENERAL**

# Estonian Law of Property Act 1993 (Structure)

## **Part 1 GENERAL**

Chapter 1 GENERAL PROVISIONS

Chapter 2 THINGS

## **Part 2 POSSESSION AND LAND REGISTER**

## **Part 3 OWNERSHIP**

### **Chapter 5 GENERAL PROVISIONS**

Division 1 DEFINITION AND CLASSIFICATION OF OWNERSHIP

Division 3 PROTECTION OF OWNERSHIP

### **Chapter 6 MOVABLE PROPERTY OWNERSHIP**

### **Chapter 7 IMMOVABLE PROPERTY OWNERSHIP**

## **Part 4 SERVITUDES**

Chapter 8 REAL SERVITUDES

## **Part 5 REAL ENCUMBRANCES**

## **Part 6 RIGHT OF SUPERFICIES**

## **Part 8 RIGHT OF SECURITY**

### **Chapter 16 GENERAL PROVISIONS**

*Chapter 17 SECURITY OVER MOVABLES*

Division 1 POSSESSORY PLEDGE

Division 2 REGISTERED SECURITY OVER MOVABLES

*Chapter 18 REAL SECURITY*

### **Division 1 MORTGAGE**

# Typical issues of property law

- Distinction **movable/immovable** (personal/real) property and consequences therefrom; delimitation from and relationship with law of obligations (*e.g. pledge*)
- **Acquisition of (full) property** in general
- **Protection** of property (*e.g. rei vindicatio and relationship with contracts law, torts law and unjust enrichment*)
- **Good faith transfers** (*movables/immovables*)
- **Security rights in rem** (*e.g. liens, fiduciary ownership, retention of title, „security interest“ under UCC and international treaties*)

What is the notion of „property“ and „ownership“? Are they legally defined?

Compare Estonian law, German law, English law and the DCFR

# **Estonian Law of Property Act 1993**

## **Part 1 GENERAL**

### **Chapter 1 GENERAL PROVISIONS**

#### **§ 1. Purpose of Act**

The Law of Property Act provides for real rights, their content, creation and extinguishment and is the basis for other laws regulating real rights.

#### **§ 5. Real rights**

(1) Real rights are ownership (right of ownership) and restricted real rights: servitudes, real encumbrances, right of superficies, right of pre-emption and right of security.

(2) The law may provide for other real rights in addition to those specified in subsection (1) of this section.

### **Chapter 2 THINGS**

#### **Division 1 DEFINITION AND CLASSIFICATION**

**§ 7. – § 31.** [Repealed - RT I 2002, 53, 336 - entry into force 01.07.2002]

# DCFR Book VIII Acquisition and loss of ownership of goods

Chapter 1: General provisions

Section 1: Scope of application and relation to other provisions

VIII. –1:101: Scope of application

(1) This Book applies to the acquisition, loss and protection of ownership of goods and to specific related issues

Section 2: Definitions

VIII. –1:201: Goods

VIII. –1:202: Ownership

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

VIII. –1:204: Limited proprietary rights

# Principles of property law

- **Numerus clausus of property rights?** *Mostly yes, in theory not in Denmark. Legislation mostly not dispositive.*
- **Principle of „separation“ of property law and law of obligations:** yes, everywhere
- **Principle of „abstraction“?** *Germany and Estonia*
- **Principle of „speciality“ (Spezialitätsprinzip) in property law:** *mostly yes, but some exceptions in some countries, e.g. general liens in France, Nordic and Baltic countries*
- **Principle of „legal certainty“ (Bestimmtheitsgrundsatz) in property law:** yes, but different ways of realization
- **Principle of „publicity“ (Publizitätsprinzip) in property law:** *very different*

# Property law: cases

- **Case 1:** Owner O sells car to purchaser P, but does not deliver. How can P get the car?
- **Case 2:** O sells again to P2 and delivers the car to him. Which claims has P against P2?
- **Case 3:** Non-owner NO sells car to P. Can P acquire property?
- **Case 4:** O delivers car to P, but retains property in the car until payment. Valid?
- **Case 5:** P grants a lien (pledge) in the car to bank B, but continues to use the car. Lien valid?
- **Case 6:** P transfers property in the car to bank B as security for a credit. Valid?

# How is property transferred?

Compare French law, German law, Estonian law, English law.

Compare also the approach of the DCFR to this question: is it closer to the German or the French model?

# French Civil Code

## **BOOK III OF THE VARIOUS WAYS HOW OWNERSHIP IS ACQUIRED**

### **Articles 711 to 2283**

#### **Art.711**

Ownership of property is acquired and transmitted by succession, by gift inter vivos or will, and **by the effect of obligations**.

#### **Art. 1141**

Where a thing which one is bound to transfer or deliver to two persons successively is purely movable, the one of the two who has been put in actual possession is preferred and remains owner of it, although his title is subsequent as to date, provided however that the possession is in good faith.

#### **Article 1583 (Sale)**

It is perfect between the parties and the ownership is acquired as of right by the buyer with regard to the seller as soon as they have agreed on the thing and on the price, although the thing has not yet been delivered nor the price paid.

#### **Art. 2279**

In matters of movables, possession is equivalent to a title.

Nevertheless, the person who has lost or from whom a thing has been stolen, may claim it during three years, from the day of the loss or of the theft, against the one in whose hands he finds it, subject to the remedy of the latter against the one from whom he holds it.

# Estonian Law of Property Act 1993

## Part 3 OWNERSHIP

### Division 1 CREATION OF MOVABLE PROPERTY OWNERSHIP

#### Subdivision 1 Delivery

#### § 92. Creation of movable property ownership by delivery [RT I 2003, 13, 64 - entry into force 01.07.2003]

(1) Movable property ownership is created **by delivery** of a movable if the transferor delivers possession of the thing to the acquirer **and they have agreed** that ownership transfers to the acquirer.

# UK Sale of Goods Act 1979: transfer of property

## PART III EFFECTS OF THE CONTRACT

*Transfer of property as between seller and buyer*

### **17. Property passes when intended to pass**

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

# DCFR Book VIII Acquisition and loss of ownership of goods

## Chapter 2: Transfer of ownership based on the transferor's right or authority

Section 1: Requirements for transfer under this chapter

VIII. – 2:101: Requirements for the transfer of ownership in general

(1) The transfer of ownership of goods under this Chapter requires that:

(a) the goods exist;

(b) the goods are transferable;

(c) the transferor has the right or authority to transfer the ownership;

(d) the transferee is entitled as against the transferor to the transfer of ownership by virtue of a contract or other juridical act, a court order or a rule of law; and

(e) there is an **agreement as to the time ownership is to pass** and the conditions of this agreement are met, **or, in the absence of such agreement, delivery or an equivalent to delivery.**

(2) For the purposes of paragraph (1)(e) the delivery or equivalent to delivery must be **based on, or referable to, the entitlement under the contract** or other juridical act, court order or rule of law.

(3) Where the contract or other juridical act, court order or rule of law defines the goods in generic terms, ownership can pass only when the goods are identified to it. ...

Please compare the provisions on good faith acquisition of property under the following regulations:

- UK (England)
- USA (under Uniform Commercial Code)
- Germany (sec. 932, 935 BGB)?
- France (art. 2279 Code civil)?
- DCFR?

# Good faith acquisition of property

## Art. 2279 French Code Civil

In matters of movables, possession is equivalent to a title.

Nevertheless, the person who has lost or from whom a thing has been stolen, may claim it during three years, from the day of the loss or of the theft, against the one in whose hands he finds it, subject to the remedy of the latter against the one from whom he holds it.

## German Civil Code

### **Section 932 Good faith acquisition from a person not entitled**

(1) As a result of a disposal carried out under section 929, the acquirer becomes the owner even if the thing does not belong to the alienor, unless the acquirer is not in good faith at the time when under these provisions he would acquire ownership...

(2) The acquirer is not in good faith if he is aware, or as a result of gross negligence he is not aware, that the thing does not belong to the alienor.

### **Section 935 No good faith acquisition of lost property**

(1) The acquisition of ownership under sections 932 to 934 does not occur if the thing was stolen from the owner, is missing or has been lost in any other way. The same applies, where the owner was only the indirect possessor, if the possessor had lost the thing.

(2) These provisions do not apply to money or bearer instruments or to things that are alienated by way of public auction or in an auction pursuant to section 979 (1a).

# Estonian Law of Property Act 1993

## § 95. Acquisition in good faith

(1) A person who has acquired a thing by delivery in good faith is the owner of the thing as of the time of receipt of the thing into the person's possession even if the transferor was not entitled to transfer ownership.

- ...

(2) An acquirer is in bad faith if the acquirer knew or should have known that the transferor was not entitled to transfer ownership.

(3) Acquisition pursuant to subsection (1) of this section is not effected if a thing was stolen, lost or dispossessed in any other manner from the owner against the will of the owner. ... This subsection does not apply to money or bearer securities or to a thing acquired by public auction.

# UK Sale of Goods Act 1979: Good Faith Purchase

## PART III EFFECTS OF THE CONTRACT

### *Transfer of title*

#### **21. Sale by person not the owner**

(1) Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this Act affects—

(a) the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were their true owner;

**(b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.**

# Uniform Commercial Code (USA): Good faith purchase

## ARTICLE 2 - SALES

### PART 4. TITLE, CREDITORS AND GOOD FAITH PURCHASERS

#### § 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting".

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer .... A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a "cash sale", or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

# DCFR Book VIII Acquisition and loss of ownership of goods

## Chapter 3: Good faith acquisition of ownership

VIII. – 3:101: Good faith acquisition through a person without right or authority to transfer ownership

(1) Where the person purporting to transfer the ownership (the transferor) has no right or authority to transfer ownership of the goods, the transferee nevertheless acquires and the former owner loses ownership provided that:

- (a) the requirements set out in VIII. – 2:101 (Requirements for the transfer of ownership in general) paragraphs (1)(a), (1)(b), (1)(d), (2) and (3) are fulfilled;
- (b) the requirement of delivery or an equivalent to delivery as set out in VIII. – 2:101 paragraph (1)(e) is fulfilled;
- (c) the transferee **acquires the goods for value**; and
- (d) the transferee **neither knew nor could reasonably be expected to know** that the transferor had no right or authority to transfer ownership of the goods ... The facts from which it follows that the transferee could not reasonably be expected to know of the transferor's lack of right or authority have to be proved by the transferee.

(2) Good faith acquisition in the sense of paragraph (1) does not take place with regard to **stolen goods**, unless the transferee acquired the goods from a transferor acting in the ordinary course of business. **Good faith acquisition of stolen cultural objects in the sense of VIII. – 4:102 (Cultural objects) is impossible.**

In which way differs the security interest under the UCC from a pledge (Pfandrecht) under German law?

# Uniform Commercial Code: Security Interest

## ARTICLE 9 – SECURITY INTEREST

§ 9-201. GENERAL EFFECTIVENESS OF SECURITY AGREEMENT.

(a) [General effectiveness.] Except as otherwise provided in [the Uniform Commercial Code], a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

§ 9-203. ATTACHMENT AND ENFORCEABILITY OF SECURITY INTEREST ...

(a) [Attachment.] A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) [Enforceability.] Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if :

(1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (3) one of the following conditions is met:

(A) the debtor has authenticated a security agreement that provides a description of the collateral ...

§ 9-310. WHEN FILING REQUIRED TO PERFECT SECURITY INTEREST ... (a)

[General rule: perfection by filing.] ...