

“The methodology of formants to define the attributes of concepts in the IMOLA project”

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The aim of Comparative Law

«Comparative law is like other sciences, in that its aim must be the acquisition of knowledge».

R. SACCO, *Legal Formants. A dynamic approach to comparative law*, American Journal of Comparative Law, Vol. 39 No 1, 1991, p. 4.

Comparative law as a science

Science

Knowledge

Methodology



Methodology

The *Factual approach*

R. Schlesinger (ed.) Formation of Contracts: A study of the Common Core of Legal Systems, 2-3 (1968).

Donald E. Claudy, *Formation of Contracts a Study of the Common Core of Legal Systems*, Cornell Law Review, Volume 54 Issue 3 February 1969.

The Formants

- R. SACCO, *Définitions savantes et droit appliqué dans les systèmes romanistes*, in *Revue Internationale de Droit Comparé*, vol. 17, n. 4, 1965, p. 827 ss.
- R. SACCO, *Les buts et les méthodes de la comparaison du droit*, in *Rapports nat. italiens au IX congrès intern. de droit comp.* 1974.
- R. SACCO, *Legal Formants. A dynamic approach to comparative law*, *American Journal of Comparative Law*, Vol. 39 No 1, 1991. pp. 1-34.

Methodology

Functionalism

Structuralism \leftrightarrow *The formants*

The unity of the legal system

«It is misleading to speak of «the legal rule» in force in a given country as though there were only one such rule».

R. SACCO, *Legal Formants. A dynamic approach to comparative law*, American Journal of Comparative Law, Vol. 39 No 1, 1991, p. 21.

The unity of the legal system (?)

In a given country at a given moment the rule contained in the constitution or in legislation, the rule formulated by scholars, the rule declared by courts, and the rule actually enforced by courts, often haven't an identical content and are not therefore the same.

The formants

Instead of speaking of "the legal rule" of a country, we must speak instead of the rules of constitutions, legislatures, courts, and, indeed, of the scholars who formulate legal doctrine.

Methodology

The Formants:

groups of rules sharing the same characteristics (legislative, case law, scholarly opinions/legal doctrine) and providing answers/solutions to a specific legal matter/problem.



Example

A person who believes himself to be heir disposes of property he has inherited by transaction to a third party in good faith.

Is the transaction effective?

R. SACCO, *Legal Formants. A dynamic approach to comparative law*, American Journal of Comparative Law, Vol. 39 No 1, 1991. p. 23.

The formants

Italy

Legislation: yes(art. 534 cc) Case law: yes Legal doctrine: yes

Belgium

Legislation : x Case law: no Legal doctrine: no

France

Legislation: x Case law: yes Legal doctrine: ?

The formants and the attributes of concepts in EU law and at IMOLA II

One

Supranational/common/uniform definition

Many different

National meanings

EU Terminology – IMOLA Terminology

- IMOLA Terminology: uniform terms expressed in a **common language (English)**.
- EU Terminology: uniform terms expressed in all the **official national languages** (24 idioms).

EU Terminology

Neologisms (legal concepts)

.....“regulation” – “règlement”- “Verordnung” – “regolamento” –
.....

Inter-lingual synonyms

WAGNER, J.C. GÉMAR, *Materializing Notions, Concepts and Language into Another Linguistic Framework*, International Journal for the Semiotic of Law, 2013.

EU Terminology

Uniform legal meaning is reached across languages, horizontally, among these **neologisms** (concepts) and through the form of their linguistic/semantic expression, but **regardless the language** chosen.

J.G. TURI, *Le droit linguistique et les droits linguistiques*, Les Chaiers de droit, Vol. 31, n. 2, 1990.

EU Terminology – IMOLA Terminology

The problems of the attributes of concepts to uniform definitions are similar!

Example: **the formants** and the EU concepts

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste

«**possession**»

Art. 3 (definitions) “waste holder” means the waste producer or the natural or legal person who is in *possession* of the waste.

The meta-concept



- Possesso (ITA)/Bestiz (Austria)/Possession (France).....material control on the good with animus domini
- Detenzione (ITA)/Innehabung (Austria)/ Détention (France)..... material control on the good without animus domini

The meta – concept and the national interpreter



The national formants

Italy (case law)

Decision of the *Tribunale Amministrativo Regionale* (29/01/2018) on Directive 2008/98/EC.

“The Italian notion of “**possesso**” and “**animus possidendi**” is not applicable as the cost of waste provided in the EU directive is not grounded on the intention of the holder/possessor to behave as an owner (with animus possidendi) but on the duty of care owed by him”.

The national **formants**

Belgium (legislative formant)

- Décret 23/12/2011 relatif à la gestion durable de cycles de matériaux et de déchets (transposition de la Directive 2008/98/CE du Parlement européen et du Conseil du 19 novembre 2008).
- “The possessor is also the person who has not the physical possession of the waste” (qui n'ont pas la *possession* physique des *déchets*).

The EU concept



possession in EU law (Directive 2008/98/EC) : material control on the good without animus domini



National law and case law (formants)

XXI General Congress of Comparative Law (Fukuoka, July 2018)

Uniform definitions are not *final* (my definition: consolidated legal concepts and not meta – concepts) until they haven't been implemented through their application to material facts at the national level (national formants).

IMOLA NATIONAL CONCEPTS TEMPLATE

Real servitude

Real servitudes in IMOLA CONCEPT TEMPLATE

Real servitudes are treated as **limited property right** and always placed in **C** section, irrespectively of their content.

The real servitude in Italy

Article 1027 Civil Code: *A real (predial) servitude is a burden upon a land (plot) for the benefit of another land (plot) belonging to a different owner.*

The fundamental elements

Italy

Therefore a real servitude can be defined “as the relationship according to which Tizio, as owner of the land A, must tolerate the action of Caio, as owner of the land B”.

The fundamental elements

Italy

- 1) Tizio must tolerate not as such, but **“because he is the owner of land A”**.
- 2) Caio can act not as such, but **“because he is the owner of land B”**.

The fundamental elements

In Italy the servitudes are typical and, as all the other real rights, belong to a fixed *numerus clausus*.

Furthermore, transcription in the land registry is justified by the effect *erga omnes* of the servitude.

The fundamental elements

Italy

Until 2012, the presence of both the dominant and the servient lands (plots) were necessary elements for the creation of a real servitude and for its transcription in the land registry.

The legislative formant

Art 2645-quater Italian Civil Code

Need the registration in public records all acts if they have as their object real estate, acts and contracts of private law, even unilateral, as well as the agreements and contracts with which they are established in favor of the State, the region, the other local public bodies or bodies carrying out a service of public interest, constraints of public use or any other constraint for any purpose required by state and regional regulations, municipal urban tools as well as by the consequent territorial planning tools and by the urban conventions related to them .

The case law **formant**

The rule declared by courts, and the rule actually enforced by courts in Italy on article 2645-quater c.c. led the tabular praxis to register the servitudes for public use as servitudes in favor of public administrations or other legal entities.

The case law **formant**

Italy

Example: a servitude for public use in favor of a public administration (as the local municipality) which allows to place a garbage bin in the property of Tizio (servient land/plot).

The application of this practice does not require the existence of a dominant land (plot).

The tabular praxis

Italy

Before 2012 the servitudes for public use were registered on the servient land thanks to a fiction (inventing a fictional/theoretical dominant land).

According to the new practice instead it is nowadays possible to register a servitude for public use on a servient land without the identification of a dominant land.

IMOLA NATIONAL CONCEPTS TEMPLATE

Real Servitudes are treated as limited property rights and will always be placed in section C, regardless of their content.

The servitude for public use should therefore be placed in section C of the Imola Template, as according to Italian law it can be qualified as a real servitude (yes or no answer).

IMOLA NATIONAL CONCEPTS TEMPLATE

It follows that in section A of the Imola Template there would be no mention of a dominant land/plot, as it may not exist under Italian law.

IMOLA NATIONAL CONCEPTS

TEMPLATE Definitions

The meta – concept

Real servitudes

the definition implies the presence of a dominant and a servient land for the creation of a real servitude and for its transcription in the land registry

IMOLA NATIONAL CONCEPTS

TEMPLATE Definitions

The concept

Real servitude:

~~burden upon a piece of land for the benefit of another piece of land belonging to a different owner.~~

burden upon a piece of land for the benefit of.....



National law and case law (formants)

Italy

France

Spain

The Netherlandsand so on.....

No
dominant
land/plot

?

?

?

The formants

Two suggestions:

- **General definitions** are necessary, but the attributes of concepts must take into account the national **formants** as components of the definition (and not simply as linked to it), regardless the semantic aspect of the definition.
- **Questionnaires** are necessary, but alongside yes/no answers the national **formants** might be showed so as to give dynamicity to IMOLA CONCEPT TEMPLATE.