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Comparative Law and IMOLA Projects

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Comparative law

- Science
- Knowledge
- Methodology



The story of the Italian CJEU Judge

Interesse legittimo

(legitimate interest)

The story of the Italian CJEU Judge

Oh yes, we have something similar in Finland: we call it “*half of a right*”!



Comparative law

- Comparative law shows how a legal system really «works».....beyond theoretical definitions.

Knowledge = data = rules (norms)

operational rules

The factual approach

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

Collecting **operational rules** by means of
QUESTIONNAIRES

Homologation

This technique consists of splitting a national legal institute into smaller concepts and then measuring the similarities and differences of the same smaller concepts in another legal system.

Homologation favors scientific comparisons between two institutes and facilitates the discovery of all differences that may be hidden behind a common legal terminology.

Homologation

Similarities and differences = legal effects that are concretely produced in the two legal systems (operational rules)

Homologation

USUFRUCT IN ITALY (Usufrutto)	USUFRUCT IN THE NETHERLANDS (Vruchtgebruik)
<p>The usufructuary has the right to enjoy an object, but must preserve its economic destination.</p> <p>Art. 981 c.c.</p>	<p>The right of usufruct provides the right to use things that belong to another person and enjoy the fruits thereof.</p> <p>Art 3:201 BW</p> <p>A usufructuary can use and use up (consume) the things under the usufruct in accordance with the rules made upon the creation of the usufruct, or where such rules are lacking, in accordance with the nature of the things and the local practice in respect to the use and using up.</p> <p>art 3:207(1) BW</p>

Homologation

Italy

Use up (to consume)

“quasi usufrutto”

real right: **NO**

The Netherlands

Use up (to consume)

“Vruchtgebruik”

real right: **YES**

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Adaptation principle

Regulations (UE) no. 650/12 on cross-border successions, on matrimonial property regime (1103/16) and on property consequences of registered partnership (1104/16)

Adaptation principle

Where a person invokes a right in rem to which he is entitled under the law applicable to the succession/matrimonial property regime and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in rem under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it.

Homologation

Measure: comparing the legal effects (operational rules).

Standard: the most relevant legal effect (operational rules) related to the “aims and the interests pursued by the specific right *in rem* and the effects attached to it”

The theory of the *formants*

Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, in *The American Journal of Comparative Law*, Vol. 39, No. 1 (Winter, 1991).

Legal rules can be found in the different formants of the various Member States (legal systems).

The *unity* of the legal system v. the *dissociation* of the legal formants.

The theory of *formants*

A specific material fact/legal issue might be regulated differently in a legal system by the legislation (legislative formant) case law (judicial formant) or legal scholars (doctrine - formant).

The formants in IMOLA II and III

Formants are useful:

- to define the attributes of the legal concepts in a more complete and systematic way.
- to collect data in a structured way.
- to connect the pivot terms with the national definitions, by uncovering the operative rules beyond the declamatory/abstract definitions.

Collecting data *WITHOUT* the theory of formants

ITALY: RIGHT OF HABITATION

QUESTIONS ON FORMANTS / ATTRIBUTES	yes	no	n.a.	Explanatory note (English) FORMANTS
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- Can it be subject to a mortgage?		X		LEGISLATIVE FORMANT → NO <i>because the right of habitation is non transferable (Civil Code, art. 1024); furthermore, this nominate right is not included in the list of goods and rights that can be subject to a mortgage (Civil Code, art. 2810).</i>
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Collecting data *WITH* the theory of formants

ITALY: RIGHT OF HABITATION

QUESTIONS ON FORMANTS / ATTRIBUTES	yes	no	n.a.	Explanatory note (English) FORMANTS
- Can it be subject to a mortgage?	→ X YES, but only with bare owner's consent			<p>LEGISLATIVE FORMANT → NO</p> <p><i>because the right of habitation is non transferable (Civil Code, art. 1024); furthermore, this nominate right is not included in the list of goods and rights that can be subject to a mortgage (Civil Code, art. 2810).</i></p> <p><i>But</i></p> <p>JUDICIAL FORMANT + DOCTRINAL FORMANT → YES</p> <p><i>the creation of a mortgage over a right of habitation is possible, under the condition that bare owners give their consent.</i></p>

Collecting data *WITHOUT* the theory of formants

ITALY: REAL SERVITUDE

QUESTIONS ON FORMANTS / ATTRIBUTES	yes	no	n.a.	Explanatory note (English) FORMANTS
- Is the presence of both the dominant and the servient land a necessary element for the creation of a real servitude and for its transcription in the land registry?	X			LEGISLATIVE FORMANT: YES Code Civil Art. 1027 <i>A real servitude is a burden upon a land for the benefit of <u>another land</u> belonging to a different owner.</i>

Collecting data WITH the theory of formants

ITALY: REAL SERVITUDE

QUESTIONS ON FORMANTS / ATTRIBUTES	yes	no	n.a.	Explanatory note (English) FORMANTS
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- Is the presence of both the dominant and the servient land a necessary element for the creation of a real servitude and for its transcription in the land registry?	X* YES, unless the servitude is created for a public use.			LEGISLATIVE FORMANT: YES Code Civil Art. 1027 <i>A real servitude is a burden upon a land for the benefit of <u>another land</u> belonging to a different owner.</i> <i>But</i> JUDICIAL FORMANT + PRAXIS → NO if the servitude is created for a <u>public use</u>
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IMOLA III and the formants

A better understanding of:

- property rights
- Land Registration systems
- other rights and operative rules connected to the Land Registration systems
- the legal effects connected to the operative rules.

Formants help in distinguishing the operational rules that are actually applied within a legal system (living law) from the definitions used by the jurists/legislators to describe the legal rules.

IMOLA III and the formants

And to.....

- fill the general definitions with a more accurate and detailed legal meaning
- contribute to the data collection for the creation of a possible Restatement of EU terminology
- update (and keep updated) the template with all the innovations and changes that can affect a legal system (and which can be brought by either the legislative or the judicial formants)
- identify differences and similarities among several legal systems and the operational rules of those systems.

IMOLA III and the formants

.....to observe not only how cases are solved in a specific legal system, but also to acknowledge all the clues/signs present today which determine how cases will be solved in the near future.

....to monitor the fields/topics in which it is probable that a change in legislation or case law will intervene. The study of the legal formants can be helpful in identifying these areas of law as a change in case law or legislation is often preceded by a dissociation among the formants or by opposite positions within the same legal formant (as for example when two appellate courts rule differently on the same topic, forcing the highest court to give a definitive ruling).

Many thanks.....

.....for your attention

.....and to ELRA for the trust in comparative law science and in our methodology.