

*IMOLA III: comparative law methodology
in the context*

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Comparative law

Science

Knowledge

Methodology



The legal formants

R. Sacco, Définitions savantes et droit appliqué dans les systèmes romanistes, in *Revue Internationale de Droit Comparé*, vol. 17, 4, 1965, p. 827 ss.

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

The definition

Formants are groups of norms sharing the same characteristics in providing solutions to a specific legal problem (or legal matter, question of law).

As the solution to a question of law can be found in legislation (legislative formant), in case law (judicial or case law formant) and in the work of scholars (doctrinal formant), these groups of rules are the three main formants.

The legal formants

A person who believes himself to be heir disposes of property (he/she has inherited) to a third person, who is in good faith.

The legal formants

Italy
Civil Code art. 534 : yes Case law: yes Doctrine: yes

France
Civil Code: X Case law: yes Doctrine: no

Belgium
Code: X Case law: no Doctrine: no

*This is a theoretical case. Note that the legislative formant might have changed after the French reform of the law of contract of 2016.

Legal formants and IMOLA III

In IMOLA III legal formants are the legal basis (legal ground) of the answers (yes or not) given by the contact points with regard to a specific registration matter.

The legal formants and the land registry

With regard to the land registry system the legal formants are the legal basis (legal ground) of an inscription in the land registry, observed from a comparative law perspective.

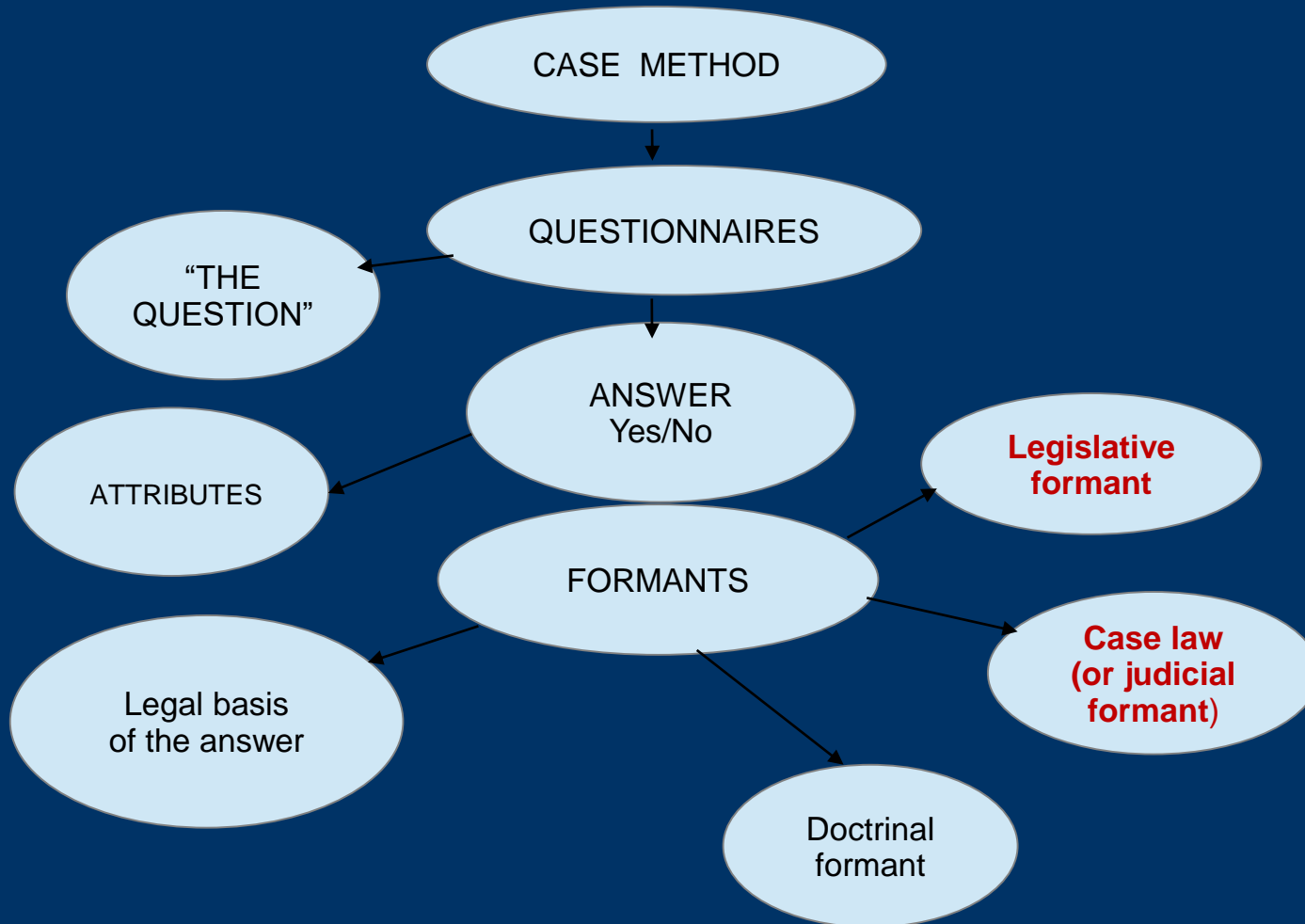
Italy

e.g. ownership or servitude: legislative formant (civil code) as as basis for registration

e.g. trust: in Italy the case law formant is the basis for registration

IMOLA III and the COMPARATIVE METHODOLOGY

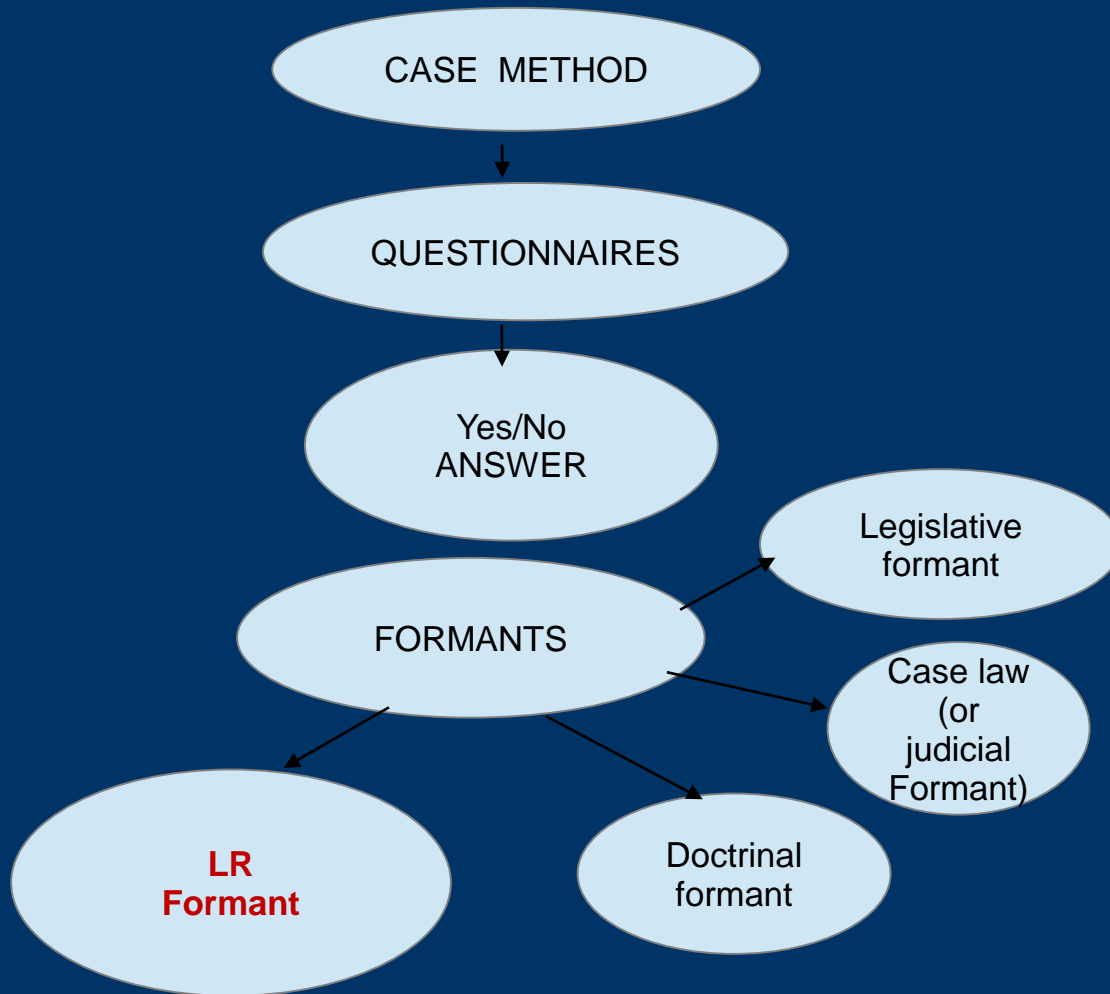
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The Land Registry (LR) formant

LR formant to be investigated as the legal ground of the answer when no other formants are at the basis of the registration (verification by subtraction)

A Land Registry formant (LR)



How to apply the formant methodology in order to assign attributes to national concepts
example: the right of usufruct in Italy

THE RIGHT OF USUFRUCT

QUESTION (n. 136): Is it a right in rem or a property right in accordance with the national legal system?

EXPLANATION:

The answer should be affirmative if it were a property right in accordance with the national applicable law.

The answer should be negative in the event of rights different from property rights. It is the case of the personal rights unless the national applicable law assimilated them to property rights.

In the event that the right or interest were not by nature a property right or right in rem, but the national property law assimilated it to the category of property rights, an appropriate option would be a negative answer and a positive answer in the question related to assimilated property rights.

There should be considered assimilated to property rights all rights which, regardless of their nature, are subject to registration, as long as they fell on a given property. [...]

How to apply the formant methodology in order to assign attributes to national concepts
example: the right of usufruct in Italy

IDENTIFIER:

PropertyRight

FORMANT:

---- ?????? ----

MEANING:

It is a right in rem or a property right according to the applicable legal system



THE RIGHT OF USUFRUCT

QUESTION: Is it a right in rem or a property right in accordance with the national legal system?

FORMANTS (Italy: Trascrizione & Libro fondiario)

- 1) **LEGISLATIVE** → A: **YES** → **specify the norm**
 - 2) **CASE LAW** → A: **YES** → no need to specify case law
 - 3) **DOCTRINE** → A: **YES** → no need to specify doctrine
 - 4) **Land registry formant (LR range)** → **(do not specify, unless this is the ONLY Formant. See next slides on the LR Formant)**
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THE RIGHT OF USUFRUCT

(Italy: Trascrizione & Libro fondiario)

QUESTION: Is it a right in rem or a property right in accordance with the national legal system?

ANSWER:

LEGISLATIVE FORMANT → YES (art. 978 ss. Italian Civil Code)

CASE LAW → YES

DOCTINE → YES

LR RANGE → X



How to apply the formant methodology in order to assign attributes to national concepts
example: the right of usufruct in Italy

THE RIGHT OF USUFRUCT

QUESTION (N. 148) Is this property right time-limited?

EXPLANATION

The answer should be affirmative if the property right in question is time-limited so that this right expires after the indicated time has elapsed, regardless of whether it is constituted for short or long term: the right does not last after the term any more.

This attribute of temporality is referred to the nature of the right and not to the type of registration: it is not a question of whether the type of registration is temporary or permanent; it is an inherent characteristic of the right. If an unlimited-time property right is covered by a temporary registration, the affirmative response remains the same.

The answer should be negative in the event of unlimited-term property rights, which stay stable, in force, without a time-limit. [...]

THE RIGHT OF USUFRUCT

(Italy: Trascrizione & Libro fondiario)

QUESTION: Is this property right time-limited?

ANSWER:

LEGISLATIVE FORMANT → YES (art. 979 Italian Civil Code

“The duration of the usufruct cannot exceed the life of the usufructuary. The usufruct constituted in favor of a legal person cannot last more than thirty years.”)

CASE LAW → YES (no need to specify case law)

DOCTRINE → YES (no need to specify doctrine)

LR RANGE → - (no need to specify)

THE EUROPEAN CERTIFICATE OF SUCCESSION

(Italy: Libro fondiario)

QUESTION: Is it possible to register a transfer *mortis causa* on the basis of a European certificate of succession?

ANSWER:

LEGISLATIVE FORMANT → NO (written rule: you always need the Italian “certificato ereditario”)

CASE LAW → YES (see the judicial decisions of the Tabular Judges/ Giudici Tavolari)

DOCTRINE → YES (no need to specify doctrine)

LR RANGE → - (no need to specify)

THE LAND REGISTRY FORMANT

→ SUBSIDIARY NATURE

→ not conceivable in systems in which registration is always disposed with a judicial order (Grundbuch, Libro fondiario...)

→ in other systems: rare cases in which a new kind of entry in the Land registry has been disposed without a legislative basis and the case law has not yet commented on the topic (possible, for instance, in Spain)

IN THIS CASE PLEASE SPECIFY IT AS THE ONLY FORMANT

Formants and IMOLA III

Formants are also 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.
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Next Workshop

Different operative rules can be found in the **formants** of different legal systems, regardless formal definitions are similar or identical

