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EU LAW TRAINING IN ENGLISH LANGUAGE:
BLENDED AND INTEGRATED CONTENT AND LANGUAGE TRAINING
FOR EUROPEAN NOTARIES AND JUDGES



This Project is funded
by the European Union's
Justice Programme 2014-2020

Comparative law and the EU PIL regulations legal language

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Fondazione
Italiana
del Notariato

Partners



Magyar Országos
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Notary Chamber of Bulgaria



International
Association of
Judges

promoting an independent judiciary worldwide

Art. 31 Reg. 650/12; art. 29 Reg. 1103/16 and 1104/16

Adaptation of rights *in rem*

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.



Rec. 16, reg. 650/12; Rec. 25, reg. 2016/1103; Rec. 25, 2016/1104

For the purposes of determining the closest equivalent national right in rem, the authorities or competent persons of the State whose law applied to the succession may be contacted for further information on the nature and the effects of the right.

To that end, the existing networks in the area of judicial cooperation in civil and commercial matters could be used, as well as any other available means facilitating the understanding of foreign law.



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Comparative law

«The primary aim of Comparative Law, like other sciences, is 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.



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Comparative law as a science

Science

Knowledge

Methodology



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Knowledge

data = rules

particularly: operational rules

Comparative law shows how a legal system really «works».....beyond definitions and legal languages.



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Methodology. Double level

Language

Legal translation:

- 1) words (ordinary language) and concepts (legal language) do not coincide (no literal translation);
- 2) different legal languages may coexist in ordinary languages (e.g. «Besitz» in Switzerland, Austria and Germany).



Methodology. Double level

Substance:

- Possible dissociation among legal words/concepts and operational rules.
- Legal effects of the institutions in the different legal systems (e.g. «usufruct» in Italy and in The Netherlands)



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Methodology of comparative law

- *Factual approach* (the questionnaires)
- *Formants*
- *Homologation*



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The Unity principle

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

«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 Formants

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 legal question can be found in the legislation (legislative formant), in case law (judicial formant) and in the work of scholars (doctrinal formant), these group of rules are the three main formants.



The Formants

A more realistic observation of the legal systems makes it clear that there can be situations in which, in regard to a specific legal matter, the **rule formulated in the civil code (legal formant)** does not correspond to **the rule enforced by the courts (case law – or judicial - formant)** or to the one **described by scholars (doctrinal formant)**.

For instance, with regard to a specific legal matter, a norm formulated in legislation could be overcome by a rule declared in court (case law - or judicial - formant).



Cass., 3e civ., 31 octobre 2012, in Rec. Dalloz, 2012 and in Sem. Jur., éd. gén., 2012.

An interesting example is the French judgement Cour de Cassation, Chambre civile 2012, known as *La Maison de Poésie*.



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France: the legislative formant

Article 543 (Code Civil)

“One may have a right of ownership, or a mere right of enjoyment, or only land services to be claimed on property” (unofficial translation).

Article 544 (Code Civil)

“Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations” (unofficial translation).



France: the legislative formant

Art. 619 (Civil code)

“A usufruct which is not granted to private individuals may last only thirty years”

Art. 625 (Civil code)

“Rights of use and habitation are established and lost in the same manner as usufruct”



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France: the case law formant

According to the Court of Cassation an owner can freely establish a **right of enjoyment** and that the right granted to the Maison de Poesie by the deed of sale was a right of perpetual exclusive enjoyment, and not a right of use and habitation.



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France: the operative rule

The e *Maison de Poesie* has the **right of enjoy and occupy, on exclusive basis and with no time limit**, a floor of a building, where the Foundation was located.



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EU substantive law

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



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Erede apparente

A **person who believes himself to be heir** disposes of inherited property to a third person, who is in good faith.

The transfer is valid in Italy, under the definition **«trasferimento dell'erede apparente al terzo»**

R. SACCO, *Legal Formants: A Dynamic Approach To Comparative Law*, in *The American Journal of Comparative Law*, Volume 39, January 1991.



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Erede apparente

Italy

Civil Code art. 534 par. 2 : yes **Case law:** yes

Doctrine: yes

Belgium

Civil Code: X

Case law: yes

Doctrine: X

France

Code: X

Case law: no

Doctrine: no



The questionnaires (factual approach)

Mr. White believes himself to be heir and disposes of inherited property to Mr. Blue, who is in good faith.

1. Is this transfer of inherited property valid in your legal system?
2. If yes, where is the rule formulated?



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The Formants and EU law

The theory of **the formants** draws a distinction between the operational rules, the real practices of a legal system and the definitions (legal language), the symbolic, linguistic set utilized by the jurists to describe the legal rules.



The Formants and EU law

EU concepts are *Meta – concepts*.

How to turn a meta – concept into a consolidated EU concept?

Solution 1: Court of Justice case law;

Solution 2: The national formants.



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EU substantive law



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 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”.

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).



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Comparative law and PIL Regulations: the meta-concepts

Habitual residence



National law and case law (formants)



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Comparative law and PIL Regulations

Adaptation of rights in rem reg. 650/12 (and reg. 2016/1103; 2016/1104).

The international private law scholars commenting the regulation suggest to rely on the methodology of comparative law in order to verify the applicability of the adaptation principle.

Homologation; factual approach; theory of the formants (operational rules).



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