DEVELOPMENTS

Review Essay – Murray Raff's *Private Property and Environmental Responsibility – A Comparative Study of German Real Property Law*

By Wendy Earle[*]

[Murray Raff, *Private Property and Environmental Responsibility – A Comparative Study of German Real Property Law*; Kluwer Law International, The Hauge/London/New York 2003; ISBN 90 411 2128 5; pp. 326; $110]

"[A] page of history is worth a volume of logic…"[1]

In the early 21st century, the notion of sustainable development is a highly charged topic that has received global attention. The 1987 World Commission on Environment and Development fashioned a definition for "sustainable development" that has gained broad acceptance. It encompasses a model that "seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future."[2]

Dr. Murray Raff, author of *Private Property and Environmental Responsibility - A Comparative Study of German Real Property Law*, lends his voice to the contemporary debate seeking viable solutions for environmental sustainability. The book advocates harmonization of international systems in order to reflect an "internationally acknowledged necessity for land use to be administered in ecologically sustainable ways."[3] This is a timely discussion.

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[1] *Quoting* Justice Oliver Wendell Holmes Jr., New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[2] *See* JAMES GUSTAVE SPETH, RED SKY AT MORNING 141(2004).

[3] *See* MURRAY RAFF, PRIVATE PROPERTY AND ENVIRONMENTAL RESPONSIBILITY 18 (2005).

The foundational legal concepts currently taught in American law schools influence the ensuing review essay. They provide the lens through which Raff's book is viewed. Following is a discussion of major topics and principles highlighted in this work, interwoven with critical comments.

The threshold concept presented in this work is that the land title registration system can mitigate environmental degradation resulting from unrestricted absolute ownership of private property. The author argues that a historical survey of German public and private property law concepts reveals underpinnings of responsible property ownership, which, if adopted by other jurisdictions, will promote sustainable development. According to Dr. Raff, the publicity principle inherent in Torrens like systems promotes factual transparency regarding environmental characteristics of the registered property.[4]

Specifically, his argument posits that the German Civil Code provisions regulating private property, built on the earlier Hanseatic model and adopted by the Australian Torrens system (and in various forms by other countries), is capable of transplanting latent duties to preserve the common good. This includes the important companion principle of responsible proprietorship of privately owned property.

Land is the basic resource. Whoever lays claim to property, gains corresponding rights that spring out of occupancy. Put simply, "The initial assignment of a property right affects the allocation of the natural resource."[5] Thus, as Dr. Raff correctly points out in the introduction, public/private conflicts arise out of conflicting views about resource allocation and property use.

The book begins by stating that both private and public law models strive to address harms resulting from "unrestrained freedom" over privately owned property (*e.g.* absolute property ownership) by placing limitations on human activity on privately held land. However, the discussion suggests that, to the detriment of the transboundary ecosystem, the common law deed system lacks legal mechanisms for imposing effective intrinsic, extrinsic, or equitable limitations on a private owner's real property rights. Instead, according to Dr. Raff, the normative model for conveying property that is most likely to enhance ecological stewardship and sustainable development is the land title registration system.

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[4] *Id*. at 267.

[5] *See, e.g.* Dale D. Goble, *Solar Rights: Guaranteeing a Place in the Sun*, 57 OREGON L. REV. 94 at 104 (1977).

It is unfortunate that the Introduction, which presents central issues, was the least compelling part of the book. Generally, the Introduction demonstrates a lack of insight into the intricacies of the American common law.[6] For instance, as an example of the consciousness of a stewardship obligation, Dr. Raff references indigenous systems, which have inherently adopted normative principles of natural resource stewardship. However, in the next sentence, he states that, "similar ideas of stewardship have enjoyed currency in the legal literature of the United States for some decades without, it appears, significant movement yet into the civil law or constitutional legal philosophy of those jurisdictions."[7] Better research into this relevant subject would have revealed that the Public Trust Doctrine, a common law concept, has in fact influenced environmental stewardship of water and other natural resources. For example, a California case has held that a city's vested water rights were subject to reexamination in order to protect the public trust in human and environmental uses in Mono Lake.[8]

Moreover, despite the statement that the land title registration system is making inroads in America,[9] the Australian Torrens system counterpart has gained only limited recognition in a few American jurisdictions.[10] There are reasons for this.

The historical perception of property as a commodity, which must be put to the "highest and best" use is deeply engrained in American property jurisprudence.[11] Thus, freedom of alienability in property transactions has become entrenched as a

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[6] In all fairness to the author it must be noted that Raff is a law professor at an Australian University and is not expected to have complete knowledge of common law theories and developments underlying American property law.

[7] RAFF, *supra* note 3, at 5.

[8] *See* National Audubon Society v. Superior Court, 658 P. 3d 709 (1983) (where the Court held that a city's vested water rights were subject to reexamination in order to protect the public trust in human and environmental uses in Mono Lake).

[9] RAFF, *supra* note 3, at 9 (identifying only fifteen states that recognize the land registration system).

[10] *See, e.g.* FILLMORE W. GALATY ET AL., MODERN REAL ESTATE PRACTICES (14th ed., 1996) " The Torrens system is currently in use in fewer than ten states, and some of these state are in the process of phasing out Torrens registration altogether. Consult your state's law to determine whether the Torrens system is active in your area…." *quoting* the 435 page educational manual that is the standard teaching tool for real estate agents preparing for licensing exams. This is the sole mention of practice procedures for title transfers under the Torrens system.

[11] *See, e.g.* I MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY 252 (2d ed., 2002) "…[S]ettlers viewed land as a commodity to buy, sell or trade…Americans…demanded a law that permitted them to exploit the one resource they had in abundance." *See also* Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663 (2003).

core policy and the ease of conveyance presented by the deed system complements this central concept. Conversely, the land title registration system stands as an impediment to speedy property transactions such as those effected, for example, by instruments like quit claim deeds. A thorough analysis of policies underlying American real property law reveals that, due to incompatibility with foundational property policies, it is doubtful that deed conveyancing, as well as similar mechanisms, will be superseded by title registration. Moreover, it can be argued that the title insurance system used in America works as the functional equivalent to the certainty provided by the register system.

However, the overview of the comparative law principle of reception in the Introduction is quite instructive. It serves as an effective segue into chapters one and two. These chapters discuss the reception of the registration system in Australia and the connection to the earlier Hanseatic model.

In these segments, the author expands on the theme that the core responsibility inherent in conveyance of title to property is registration of ownership for purposes of certainty. The discussion suggests that land title registration allows imposition of intrinsic concepts of "responsible proprietorship" because it requires an act of publicity. The author supports this viewpoint by maintaining that, while ostensibly incorporating the principle of publicity, which promotes transparency and certainty in land transactions, the German system and it's Australian counterpart also incorporate latent notions of social and environmental responsibility inherent in both the culture of early Hanseatic as well as in their early real property laws.

During feudal times, trading cities located near the Baltic Sea formed a co-operative Hanseatic League in order to facilitate freedom of trade.[12] As early as the 13th century, in a parallel development, a model of the later Torrens system, incorporating public record keeping of property ownership, came into effect. By implementing a public system of land title registration, the cities were able to free themselves from feudal restraints on property ownership. In the 19th century, Hamburg extended the notion of land title registration to help develop a sophisticated system of land administration. Thus, "[t]he very Estate or proprietary interest subject to civil law protection was defined according to appropriate use in view of environmental and planning consideration."[13] Dr. Raff contends that these early developments allowed property uses to be categorized according to spatial relationships. The land title system that was subsequently transported to Australia

[12] RAFF, *supra* note 3, at 61-62.

[13] *Id*. at 87.

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incorporated core notions of responsible proprietorship, which can be analogized to modern concepts of sustainable development.

Chapter two presents a comparative analysis of German and Australian property systems. Like America, Australia originated as a British Crown Colony where the concept of encouraging yeoman farming was a policy underlying property ownership.[14] Unlike America, localized Australian systems developed customs that apparently pointed towards a need for certainty in land transactions. This culminated in the adoption of a reformed property system, which preserved the classification system of estates in land but rejected common law deed conveyancing. The resulting model is the Australian Torrens system.[15] The book fails to give a good definition of this system and much of the discussion is abstract.

However, a noteworthy segment looks at the influence of Dr. Hűbbe, a German scholar and lawyer.[16] He believed that "…the Hamburg registration is the modern day expression of the formerly unified German and English Saxon land transfer method without distortions stemming from the remnants of Norman feudal law and the engines of equity developed to evade it."[17] This suggests that Anglo/American and German conveyancing methods share common roots and may explain the parallel tracks, which emerge upon thoughtful consideration of various property concepts presented in the book.

Nonetheless, it is apparent from the discussion that fundamental jurisprudential differences exist. An example is the premise that German concepts are driven by a focus on "possession" of real estate as distinguished from "ownership" of real estate.[18] Thus, the important distinction between the Anglo/American common law and the Hanseatic and later German civil code system is that in the German *Grundbuch* (land title register), real estate is organized by property rather than by rights holders.

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[14] *See* Antonio Esposito, *A Comparison of the Australian ("Torrens") System of Land Registration and the Law of Hamburg in the 1850's*, 7 AUSTRALIAN J. LEG. HIST. 193 (2003).

[15] *See* BLACKS LAW DICTIONARY 712 (7th ed. 1999) "Torrens system: system for establishing title to real estate in which a claimant first acquires an abstract of title then applies to court for issuance of title certificate which serves as conclusive evidence of ownership."

[16] *See* Antonio Esposito, *Ulrich Hűbbe's Role in the Creation of the "Torrens" System of Land Registration in South Australia,* 25 ADELAIDE L. REV. 215 (2004); *See also* ANTONIO ESPOSITO, DIE ENTSTEHUNG DES AUSTRALISCHEN GRUNDSTÜCKSREGISTERRRECHTS (TORRENTSYSTEM) – EINE REZEPTION HAMBURGER PARTIKULARRECHTS? (2005).

[17] *See* RAFF, *supra* note 3, at 40.

[18] *Id.* at 58.

The notion that natural law principles manifest normative concepts of responsibility towards interests in property is introduced in chapter three. The synopsis of classical and neo-scholastic natural law norms is enriching and thought provoking. The American understanding of "natural rights" is based on the Lockean view that all people enjoy "…certain 'natural rights' including life, liberty and the enjoyment of property."[19] According to Locke, men agree to come together and contract for the type of government that they want. His theory is not based on an individualistic ideology but rather a corporatism ideology where the well being of the governed community as a whole is the focus. In turn, effective governance requires a social contract, which forms the basis for limitations on the rule of law and government.[20] However, in order to maintain the well being of individuals within the community, certain rights must be preserved against encroachment from political acts of legislation by the government. In turn, this creates a social contract, which forms the basis for extrinsic limitations on the rule of law and government.[21] This sets up a natural tension between civil liberties and universal and independently existing liberties. These concepts extend to property law as well.[22] Dr. Raff's enlightening presentation of continental classical natural law principles augments the understanding of a reader acquainted only with the Lockean model.

The author's discussion illustrates well the effect of natural law principles on property law, which contrasts starkly with positive law jurisprudence. A good description of natural law is that it incorporates attributes that exist "independently of anyone's will or fiat or preference."[23] By contrast, positive law is defined as "[a] system of law promulgated and implemented within a particular political community by political superiors, as distinguished from moral law or law existing in an ideal community or in some nonpolitical community."[24] The book is correct in implying that natural law concepts would tend to promote a concept of environmental responsibility. In natural law, property is referenced apart from the owner. Physical characteristics of the land itself gain more importance in this type of system. Alternatively, under positive law, enacted laws dictating ownership

[19] *See* UROFSKY & FINKELMAN, *supra* note 11, at 15.

[20] *Id.*

[21] *See id.*

[22] *See* I MELVIN I. UROFSKY & PAUL FINKELMAN, DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 27 (2d ed., 2002).

[23] GARY MCDOWELL, 11 THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY 718 (1985).

[24] *See* BLACK'S LAW DICTIONARY 948 (7th ed. 1999).

rights figure more prominently. This may serve to diminish the focus on the environmental well being of individual property. Concrete illustrations like this one are valuable because they challenge the American reader to consider pros and cons of the two legal systems.

Raff's overview suggests that natural law gives rise to social duties, which dictate that owners "deal appropriately" with their property.[25] As a result, unarticulated duties arising out of "the nature of the thing" operate to limit property ownership to less than fee simple absolute.[26] Consequently, the original German civil code system, which effectively codified pre-existing law, embeds a concept of responsible proprietorship.[27] Moreover, the author presents a persuasive and insightful argument that the natural law model of responsible proprietorship evident in Hanseatic law is also present in modern German public and private law principles.

German law embodies dual concepts of both public and private property. It distinguishes between "public things proper,"[28] and laws affecting private property rights. To the uninitiated, this can be a confusing distinction. Consequently, chapter four is valuable because the overview of public law concepts is instructive, particularly the initial section referencing the Bonn Constitution of 1949. For example, an American reader may not be aware that the Constitution incorporated classical natural law principles in reaction to the Nazi regime and the corollary positive laws articulated during that era.[29]

Accordingly, *Grundgesetz* (GG - Basic Law or Constitution) art. 14, which articulates the primary protection for private property rights, references natural law. This includes an expression of social responsibility on behalf of the common good.[30] More recently, *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court) decisions addressing cases arising out of land use disputes on private property have upheld the responsibility to the common good articulated in GG art. 14(2), when measured against the "rational and reasonable owner" test.[31] As the book

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[25] RAFF, *supra* note 3, at 156.

[26] *Id.* at 157.

[27] *Id.* at 136.

[28] *Id.* at 162.

[29] *Id.* at 169.

[30] *Id.* at 165.

[31] *Id.* at 173-174.

points out, German public law provides an overlay to private property law principles.

Along the same lines, chapter five presents substantive law principles underlying contemporary German private property concepts. It is apparent that the *Bürgerliches Gesetzbuch* (BGB - German Civil Code) is a highly structured classification system of rights and claims to "objects" of property. Civil code models can be justifiably criticized for promoting normative ossification. Conversely, this reader's subjective preference is the common law, which appears more adaptive and flexible in its ability to respond quickly to changing social norms.

However, this segment succeeds in making a very credible argument that the German civil law has successfully incorporated forward-looking concepts from GG art. 14(2) (relating to the common good), which engraft principles of social responsibility into private property law. What emerge are a number of cutting-edge court decisions that harmonize public and private law and operate to place both discretionary and exclusionary limitations on property ownership.[32]

The discussion of the German Federal land title registration system is particularly relevant.[33] Under the German dual system, a *Grundbuch* with an accompanying Cadastre[34] references both land parcel ownership and the spatial area covered by each discrete registry. Upon title registration, a process that does not require a judge, indefeasible title to private property passes and is immediately entered in the *Grundbuch*. As a result, registration of ownership raises a legal presumption of correctness (*Rechtsschein*),[35] which can be defeated only by facts demonstrating the true position of right (*wirkliche Rechtslage*).[36]

An Anglo/American acquainted with the common law property scheme will undoubtedly recognize analogies. For instance, like the title registration system,

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[32] *See, e.g. id.* at 194.

[33] *See id.* at 210-268 (for an inclusive discussion of the *Grundbuchverfuegung* [laws and regulations], which control the land title registration system).

[34] *See id.* at 211- 212 (explaining that "[t]he entire area of Germany has been divided into cadastral units, which are recorded in the land information Cadastre according to identification codes.") A cadastre can be compared to a plat map used in the American property system, which is most often based on a survey and is used to define "property descriptions…by referring to the appropriate map." *See also* BLACKS LAW DICTIONARY 939 (7th ed. 1999)

[35] *See* RAFF, *supra* note 3, at 266. (discussing the notions of "apparent right" and "true position of right").

[36] *Id.*

public recording is a standard practice in American jurisdictions.[37] A buyer with public notice is a *bona fide* purchaser who takes ownership in good faith without notice of claims against the interest in property.[38] Likewise, the regulations that implement the German Federal land title registration system[39] prescribe that a person with knowledge of the contents of the register takes an interest in property under the principle of public good faith. This core principle raises a legal presumption that a registered property right belongs to the person who is recorded in the Land Title Registry. Thus, recorded transactions are presumed absolute and can be relied on in good confidence. [40] In this case, the parallel tracks in the evolution of civil code and common law systems become self-evident. Both have developed mechanisms that provide certainty and transparency in property transactions by developing legal mechanisms providing notice of ownership.

However, the two systems can still be distinguished. Under the common law system, possession alone gives constructive notice of ownership. Thus, equitable interests can still arise. Conversely, in Germany, the Register raises the presumption of notice and disallows future fragmentation by preserving the natural enjoyment of a unique interest.

Finding the juxtaposition between natural law and positive law principles can be problematic for a scholar inculcated in one system or the other. *Private Property and Environmental Responsibility* leads to the conclusion that positive law is an extrinsic expression of limitations on individual actions whereas natural law works to preserve inherent duties associated with an object. However, the two conflicting approaches are not mutually exclusive.

Just as German jurisprudence is capable of encapsulating normative values promoting the common good, American legal norms are equally capable of redefining highest and best uses in terms of the public interest. [41] Only in identifying areas of commonality between American and German real property

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[37] *See* JON BRUCE, REAL ESTATE FINANCE 180 (2004) (discussing recording statutes). *See also* E-Z REVIEW FOR PROPERTY 66 (Randy J. Riley, Esq. et al. eds. 2002) (explaining that recording statutes work "[t]o give notice to all other prospective purchasers of real estate…").

[38] E-Z REVIEW FOR PROPERTY 66 (Randy J. Riley, Esq. et al. eds. 2002).

[39] *See* UROFSKY & FINKELMAN, *supra* note 22, at 210.

[40] *Id*. at 185-188, 215, 232.

[41] *See, e.g.* National Audubon Society v. Superior Court, 658 P.2d 709 (1983).

heritage will the concept of responsible proprietorship gain a credible foothold in the international legal community. This book courageously proposes an international model for sustainable development but fails to offer viable solutions for cross-jurisdictional harmonization. All the same, *Private Property and Environmental Responsibility* is particularly a valuable resource for American legal scholars interested in learning about a sophisticated foreign property system. However, even with that praise for the book, a number of key issues nonetheless should have been treated in an alternative manner.

First, the author fails to demonstrate conclusively why he devotes so much detail to a comparative discussion of the Hanseatic model and subsequent property system developments in Australia. Thus, I can only infer that the discussion is driven by a desire to firmly demonstrate that the original Hanseatic model, along with the later German land registration system, carry with them common principles of environmental responsibility which, after reception from the German donor system, are capable of successfully maturing in common law systems.

Second, in limited instances where the author engages in a functional analysis of land title registration systems vis-à-vis common law deed systems, his conclusions demonstrate a preference for land conveyancing systems that are reflective of the German civil code model. For example, Dr. Raff contends that from a global perspective, the German land title registration system is the emerging and preferred model for conveying property because other countries are successfully adopting Torrens-like systems. In this case, an informed comparative discussion exploring why America has chosen to reject the Torrens system would have been enriching in order to better understand the authors premise that land registration is a preferred global model for enhancing sustainable development.

Despite these shortcomings, *Private Property and Environmental Responsibility* succeeds in presenting instructive material. In order to obtain the clearest understanding of the materials presented in the book, I suggest reading the chapters in the following sequence: (1) For a coherent overview and understanding of the issues and law presented in detail elsewhere in the book read the Conclusion first; (2) Next, the American reader will benefit from reading chapter 3 because it presents a solid synopsis of classical natural law concepts, an understanding of which is imperative in order to gain a comprehension of fundamental principles underlying the German civil code system as well as the earlier Hanseatic model; (3) Finally, the reader should take up the Introduction followed by chapters 1, 2, 4, and 5.