Preface

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Our goal in producing this book, with the collaboration of many colleagues from many jurisdictions, is to facilitate the research and the study of property law from a comparative standpoint. More often than not, property law is presented as an eminently local branch of the law, deeply embedded in a specific context. Although property arrangements can be very different indeed, and surely reflect local dimensions of social life, this assumption does not do justice to the topic as an academic subject. It is possible to learn a lot from the comparative study of property law, and the tendency to do so is growing, due to the expansion of cross-border transactions, and the global dimensions that many social, economic and environmental problems have acquired. Nonetheless, the comparative legal literature on property remains meagre in comparison to what comparative law has done in other respects. Other areas of the law, such as constitutional law, contracts, torts, company and financial markets law, have benefitted from a much more intense research effort by the comparative law community. A single volume on comparative property law cannot by itself change this situation, since it cannot be exhaustive. Readers may therefore wonder what considerations played a role in determining the contents of this *Handbook*. The ambition of studying the institutions of property in comparative perspective today poses new challenges, because the national dimensions of the law, including property law, are receding in importance. This is why the title of this book makes reference to the global dimensions of the subject as well, which are exemplified by Amnon Lehavi's chapter on land law in the age of globalization and land grabbing (Chapter 13). To avoid any misunderstanding, it must nonetheless be made clear that this book does not intend to provide a systematic discussion of property in international law. International law aspects come into this book only in relation to particular topics. One such topic is international cultural property law, thanks to the chapter prepared by Francesco Francioni (Chapter 17). This exception to our basic choice is justified because the regulation of cultural property in international law, more so than other fields of international property law, arises primarily out of efforts to coordinate national cultural property law; although in recent times we have witnessed the growth of truly international law regimes in this respect too. Secondly, Federico Lenzerini's chapter (Chapter 18) on the land rights of indigenous peoples under international law covers a new area of international law that has a growing impact on the national policies of governments towards indigenous communities across the world. This aspect of international law was considered simply too important to be left out, in light of the fact that this book is intended to cover several topics concerning such communities and their property rights.

Lawyers know all too well that the word 'property' is rich in meaning to the point that it poses serious definitional problems. An essential task in the preparation of this

publication was therefore to fix the boundaries of what counted as property for this book. In setting the boundaries, a first choice was that we would leave aside intellectual property. Even though the topic is extremely and increasingly important, this choice was easy. The problems that are dealt with in the regulation of intellectual property are well covered elsewhere, and they have only a modest degree of resemblance to the problems involved in the regulation of property over physical resources. A second choice was more difficult to make. This book does not cover property rights created with the purpose of granting a security, such as mortgages, pledges hypothecs and so on. The functioning of modern market economies requires the existence of such rights, because they reduce credit risk and so allow creditors to lend capital at a lower cost. In this way, these rights allow debtors to unlock the capital represented by all kinds of assets. There is no doubt that, in principle, security rights over tangibles and intangibles belong to the province of property law. Nonetheless, it is also true that they have a rather specialised and limited function. In light of this, this was considered a field of enquiry for another day, as the book intended to explore other dimensions and functions of the law of property.

The selection of the topics which were eventually included in the book was dictated by the purpose of the series to which this book belongs. It is not jurisdiction specific, but rather encourages editors to seek contributions from a variety of countries. In our view, the *Handbook* had to provide a clear sense of the state of the art in certain matters, but also to explore topics with a critical edge, which could provide a springboard for further research, and could also rejuvenate the subject.

Three chapters of the book show what insights the comparative study of property laws can gain by turning to neighbouring disciplines. By now legal philosophy, economics and psychology have greatly contributed to the literature on property. This publication could add little to these multi-disciplinary scholarly endeavours, and thus we turned elsewhere. In making our selection, we were happy to receive chapters on property in prehistory by Timothy Earle (Chapter 1), on the anthropology of property by Bertram Turner (Chapter 2) and on property in the religious sphere, by Roberta Aluffi and Domenico Francavilla (Chapter 16).

In today's world, property is a contested institution on many grounds. With a few exceptions, the literature on property law produced by the comparative law community must still incorporate into the mainstream the findings that emerge from research carried out by area specialists who have engaged with these critical dimensions of property law. These aspects of the contemporary landscape are explored in Amnon Lehavi's chapter on the globalization of property and land grabbing, mentioned above (Chapter 13), in David Schorr's chapter on water rights (Chapter 12), in the chapter by Anne Larson, Iliana Monterroso, Mani Ram Banjade and Esther Mwangi on community rights to forests in the tropics (Chapter 20) and in Filippo Valguarnera's chapter on access to nature (Chapter 11).

The literature on property law produced by the comparative law community so far has seldom ventured into these territories. The result of this is that the treatment of property in comparative law books all too often provides little stimulus to understand how property regimes work in specific contexts, although these contexts are of vital importance for a great part of humanity. These chapters are intended as a first effort to reverse this trend. The same considerations apply with respect to the development of

property regimes governing communities living outside the formal boundaries of the law, or under customary rules. These norms are far from marginal, as the customary domain remains a major tenure regime for a great part of the population of the world. With respect to Sub-Saharan Africa these regimes are discussed by Liz Alden Wily's chapter on customary tenure (Chapter 21). Kent McNeil's chapter on indigenous territorial rights in the common law (Chapter 19) addresses the theme for Australia, New Zealand, Canada and the United States, having principal regard to the interactions between the dominant legal systems of these four nation states and the pre-existing indigenous legal orders. Jorge Esquirol's chapter on formalizing property in Latin America (Chapter 15) provides coverage of developments in the law of property with special regard for the challenges posed by the informal sector in Latin America. The trajectory of China's property law mapped in Shitong Qiao and Frank Upham's chapter on China's changing property law landscape (Chapter 14) shows how the transition from socialism to a mixed economy may take place under conditions in which law has stayed largely marginal and nominal, coming in (to borrow their words) as the final confirmation of policy reforms, rather than as the precondition of those reforms. The essential message of these chapters is simple. One of the principal functions of the law of property is to establish precisely which forms of property ownership are legitimate, and which are instead held to be less legitimate, or illegitimate, with momentous consequences for those exposed to the political decisions behind these distinctions.

The *Handbook* also provides chapters that are dedicated to topics that have been more intensively investigated by classical comparative law research. The purpose of these chapters is to provide guidance to the state of the art in comparative property law research. The constitutional dimensions of property law regimes are explored by André van der Walt and Rachael Walsh (Chapter 9). Giorgio Resta provides an analysis of the systems of public ownership that modern states have adopted (Chapter 10). The realm of private property is examined by several contributions. Sabrina Praduroux examines what objects are the suitable subject matter of ownership or other proprietary rights (Chapter 3). Bram Akkermans discusses the *numerus clausus* of real rights (Chapter 5), and Lars van Vliet addresses the topic of the transfer of property *inter vivos* (Chapter 7). Alexandra Braun covers comparative research in trust law (Chapter 6), while Yaëll Emerich's chapter deals with the controversial topic of possession (Chapter 8). Michele Graziadei's contribution to this part of the book (Chapter 4) discusses how the distinction between civil law and common law jurisdictions complicates the study of comparative property law, and how to approach the problems that such a study poses.

We thank Andrew Ruban for logistical and editorial assistance over a long period of time. We are greatly indebted, of course, to the authors who decided to join us in the preparation of this book. We were struck by their willingness to contribute and by their enthusiastic response to the invitation to join an ambitious project. We hope that our readers will appreciate the collective effort to break some new ground in the study of property law in different societies, and across different legal categories and traditions.

Only a few weeks before this book was published, we were saddened to receive the very unexpected news of the passing of Professor André van der Walt, one of the contributors to this book. This most distinguished scholar was the first holder of the

South African Research Chair in Property Law at Stellenbosch University. We are very proud to have his contribution, co-authored with Professor Rachael Walsh, as part of this collection.

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