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Contesting the Registration of Real Estate Rights in BRICS and the Laws of Other Countries

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Abstract. In doctrinal sources, a claim for the recognition of property rights constitutes a special protection method that is not commonly found in the legislation of every country and is not widespread like vindication and negatory actions. However, there has been no sufficient research on the judicial means of correcting the errors that occur during the registration of real estate rights. This article is a comparative legal study of national laws of those countries that provide for the registration of rights (titles) in real estate but not for the acts (deeds) from which the rights emerge. It is commonly held that claims for the recognition of property rights are known only to some legal systems and are not found in the laws of several states. Our study revealed that this is not entirely true. First, claims for the recognition of property rights do exist in the laws of countries of the Romano-Germanic legal family. In several countries, they are enshrined at the legislative level; in other countries, they are formulated at the level of judicial practice and recognized in legal doctrine; while in some countries, this claim relates to contesting the registration of real estate rights. Second, there are analogs of claims for the recognition of property rights also found in common law legal systems, which operate through tort claims arising from two possible violations – conversion (appropriation) and slander of title (libel of the title). The many different methods and instruments for correcting registration errors in the laws of different countries may be described as a single type of claim – the claim for the recognition of property rights. This

claim is applied when the reliability of an entry in the registry of the real estate rights is questioned or when the right of an individual entered in the registry is contested. Claims for the recognition of property rights aim to correct erroneous entries in the registry of rights to real estate when an individual considers themselves the owner of a real estate, but the real estate is registered under a different individual.

Keywords: property rights; real estate; real estate title registration; land registration; real action; property rights recognition claim; negatory action; vindication action.

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Introduction

Historically, the development of judicial practice and scientific doctrine concerning the claims for the recognition of property rights has been associated with social upheavals and economic and political transformations. It goes without saying that the unstable development of an economy naturally requires certainty on who owns real estate and the rights to such real estate.

Claims for the recognition of property rights play an important role in the effectiveness of the registration of real estate rights. This claim provides legal certainty regarding the right to real estate (right holder) and helps to ensure the reliability of the registry of real estate rights.

This study analyzes how various national laws manage the correction of the errors that occur during the registration of real estate rights. After analyzing different approaches to this issue in various national legal systems, suggestions may be

proposed for a unified judicial means of correcting registration errors associated with the recognition of property rights recognition claims.

The main thesis of this paper is that the means of correcting the registration errors that arise in various jurisdictions can be generalized and unified under a single claim – the claim for the recognition of property rights. The research question can be formulated as follows: Is it possible to unify the maintenance of registers of real estate rights to create a common correction method for registration errors in the laws of different countries?

Subsequently, the subsidiary theses of the study can be formulated as follows:

1. Is it possible to identify multiple approaches to the qualification of a claim for the recognition of a right *in rem* under Romano-Germanic law, and is it possible to propose a common way of correcting registration errors for the laws of these countries?

2. Can the rules on claims for the recognition of property rights in community law, such as the European Community, be harmonized positively and effectively?

3. What is the relationship between a claim for the recognition of property rights and a claim for conversion and slander of title in common law countries?

4. Can the hypothesis that a claim for the recognition of property rights is known only to some legal orders and is not common in the laws of many different states be regarded as true?

5. Is unifying and harmonizing the laws of different countries pertaining to the issue of correction of a registration error through the application of a common method for the recognition of property rights feasible, or are such prospects for the development of the laws of different countries impossible?

The legal literature suggests that property rights recognition claims are only found in the legislation of some countries, as it is an exotic instrument for safeguarding the rights to real estate. This study examines the laws of different countries that are applicable when contesting the right to a real estate in the registry through the use of property rights recognition claims. This allows us to determine how common such claims are in the legislation of different countries.

It is observed that there is no systematization of the scientific approaches to the legal classification of these claims. The claim itself is common in the legal order of foreign countries, but there is no comparative legal research carried out by researchers from these countries. Therefore, it has become vital to generalize and harmonize the laws of different countries in the context of the application of property rights recognition claims.

Despite the fact that this claim has existed in the legislation and judicial practice of several countries since the 19th century, issues related to its legal nature, definition, and general description often cause difficulties.

1. Challenging the Land Registration: Literature Overview

Property rights recognition claims aim to correct inaccurate information in the registries of rights to real estate and strategically improve the registration system. In developed legal systems, the prompt correction of erroneous entries in the registry of real estate rights is not a pressing issue because the legal mechanisms for correcting inaccuracies in registry entries have been developed and streamlined over the long period of the existence of the registration system of real estate rights. Additionally, the bulk of scientific publications are not related to the judicial challenge of the rights entered in the registry but to improving the entire registration system.[1] As a result, it would be beneficial to systematize the different options for correcting errors in order to create a foundation for unifying and harmonizing real rights and property registration across different countries.

It would be incorrect to say there are no scientific publications on correcting erroneous registry entries. As Goymour writes:

> When the Land Registration Act 2002 first came into force, the prevailing academic view was that it had created a system of 'title by registration,' such that, where someone (B) is mistakenly registered as the owner of another person's (A's) land, he acquires a good title (notwithstanding the mistake) that can validly be conveyed to someone else (C). … whilst the logic of the 'title by registration' principle might be conceptually attractive, it has proven to be unworkable in practice, is questionable as a matter of policy, and – looking to the future – ought to be abandoned in favor of a more subtle legislative scheme for resolving A-B-C disputes.[2]

In the above quote, the author seeks to balance the principle of introduction and the principle of opposition. The determination of the legal value of registration of the right to real estate, from the moment of registration and by virtue of it, or from the moment of committing legal facts (making a contract, etc.), depends on finding this balance.

In his article, Ko draws attention to the fact that erroneous entries in the registry of real estate rights can be eliminated through correction and indemnity, and by themselves, these mechanisms make it possible to reduce the acuteness of the

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[1] *See* Kashyap, A., & Batwara, V. (2022). Legal Analysis of Real Estate Investment Trust Regulation in India. *BRICS Law Journal, 9*(1), 133–134; Goscinski, J., & Kubacki, A.D. (2020*).* Land registration concepts in translation. *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique, 34*(17); Bondarieva, M. (2019). The role of the notary in the efficient protection of property rights. *Access to Justice in Eastern Europe, 4*, 60; Lee, A. (2016). Land registration: validity, priority and statutory interpretation. *Hong Kong Law Journal, 46*(2), 415; Carruthers, P. (2015). A tangled web indeed: The English Land Registration Act and comparisons with the Australian Torrens system. *University of New South Wales Law Journal, 38*(4), 1261; Chen, L. (2014). Land registration, property rights, and institutional performance in China: Progress achieved and challenges ahead. *Hong Kong Law Journal, 44*(3), 841.

[2] Goymour, A. (2013). Mistaken registrations of land: Exploding the myth of "Title by registration." *Cambridge Law Journal, 72*(3), 617.

problem of registration of rights to real estate and modernize the system rather than reform it.[3] Similarly, great importance is attached to correction and indemnity in the overcoming of registration errors according to a study conducted by Lees.[4]

All of these studies are carried out as part of the process of seeking to reform the national registration system, and subsequently, the problem is leveled off by developing a mechanism for its elimination and adjustment.

More detailed studies on contesting registered rights and correcting registration mistakes can be found in research based on the legal doctrine of Romano-Germanic legal systems. In these studies, researchers have a more unified approach to the legal nature of claims to correct errors in the registry.[5]

In contrast to the above studies, it would also be worthwhile to pay attention to the judicial correction of registration errors when such corrections are initiated by an interested party submitting a claim to resolve a real estate dispute while not demanding compensation.

2. Methods of Comparative Law as a Basis for Research

The methods used in this research were determined by the main issue to be analyzed: how registration errors are corrected under the laws of different countries and whether claims for the recognition of property rights can be used for that purpose. Different countries apply different instruments to challenge registered rights, and these instruments for addressing registry errors are used within judicial procedures. Therefore, the question that needs to be resolved is whether it is possible to unify the different judicial correction instruments for addressing registration errors into a single type of claim – a claim for the recognition of property rights.

The main research method employed was the analysis of legislative acts of different countries. The countries were grouped depending on the degree to which their legislation included provisions for addressing property rights recognition claims. In the countries where property rights recognition claims have no legislative basis, scientific literature and judicial acts were studied.

While choosing the countries for the comparative analysis, we focused on jurisdictions where the title in real estate is registered in a registry rather than being founded on an act (deed) on which the title is based. Such a choice is caused by the

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[3] Ko, S. (2013). Rectification and indemnity in land title registration: A risk analysis for reform. *Hong Kong Law Journal, 43*(1), 111.

[4] Lees, E. (2013). Title by registration: Rectification, indemnity and mistake and the Land Registration Act 2002. *Modern Law Review, 76*(1), 62.

[5] *See* Wieling, H.J. (2006). *Sachenrecht. Bd. 1: Sachen, Besitz und Rechte an beweglichen Sachen* (p. 626). Springer. (In German); Dauner, B., Heidel, T., & Ring, G. (2008). *Nomos Kommentar zum BGB. Bd. 3: Sachenrecht* (p. 201). Nomos. (In German); Schellhammer, K. (2009). *Sachenrecht nach Anspruchsgrundlagen* (p. 458). C.F. Müller. (In German); Kostkiewicz, J.K., et al. (2011). *Schweizerisches Zivilgesetzbuch. Kommentar* (p. 1606). Orell Füssli. (In German); Reboul-Maupin, N. (2012). *Droits des biens* (pp. 480–496). Dalloz. (In French).

practical need to limit the scope of the study, which otherwise would be too wide and would go beyond the volume of a scientific article.

The comparative jurisprudence method suggests that in foreign legal orders, this method of protection is also most often used to adjust the registry of rights to real estate. At the same time, the possibility of filing a claim to recognize property rights in some countries is enshrined in legislative acts, while in others it is based on judicial interpretation.

3. Results

3.1. Property Rights Recognition Claims in Countries Using a Romano-Germanic Legal System

There are several approaches to qualifying and determining the legal nature of claims for the recognition of property rights.

In the *first approach*, property rights recognition claims are considered a general method of protecting civil law. For example, Article 1.138 of the Civil Code of the Republic of Lithuania lists the methods for protecting civil rights and, among others, indicates the possibility of recognizing rights.

While the Civil Code of Belarus does not contain a special article dedicated to property rights recognition claims, the possibility of its application stems from Article 11 of the Civil Code of Belarus, which allows for filing a claim to recognize rights.

In the *second approach*, property rights recognition claims are not explicitly named as a method of protecting property rights in any particular law. For instance, Japanese civil law distinguishes three types of claims for the protection of property rights: the demand for the return of property, the demand to eliminate a violation of property, and the demand to prevent a violation of property. The first type of claim relates to vindication, whereas the latter two define the scope of the negatory action in Japan.

The absence of an explicit, normatively-enshrined claim for the recognition of property rights does not mean that there is no such method of protection in the legal order of a particular state. This type of approach is also applied to Russian and Spanish law.

The 1992 Netherlands Civil Code, in Book 5, Section 1, "Rights *in rem*," states that there are two real actions – a vindication action and a negatory action. In the scientific literature in the Netherlands, particularly at the level of dissertation research, the scope of real action is limited to two types, with a universal emphasis on the negatory action.[6]

In the *third approach*, property rights recognition claims are considered a type of vindication or negatory action, which are subject to satisfaction if the plaintiff proves that they have a real right to the estate that is the subject of dispute. Article 2247

[6] *See* Es, P.C. van (2005). *De actio negatoria: een studie naar de rechtsvorderlijke zijde van het eigendomsrecht*. Doctoral Thesis. Meijers-reeks. Wolf Legal Publishers. (In Dutch).

of the Argentine Civil and Commercial Code of 2016 (Código Civil y Comercial de la Nación), entitled "Property Claims," contains the following rule:

> Property claims are the means of protecting the existence, completeness, and freedom of property rights against violations that hinder their implementation. The property claims provided for in this chapter are vindication, confessional action, negatory action and boundary action. (Las acciones reales son los medios de defender en juicio la existencia, plenitud y libertad de los derechos reales contra ataques que impiden su ejercicio. Las acciones reales legislationladas en este Capítulo son la reivindicatoria, la confesoria, la negatoria y la de deslinde.)

The beginning of Article 2247 specifies that real claims confirm the existence of property rights (existencia), which is the purpose of property rights recognition claims. The Argentinian law includes four real claims, namely, a vindication claim, a negatory action, a confessional claim (understood as a claim in defense of the right of the owner of an easement), and a claim to determine the boundaries of land plots. Consequently, in Argentinian law, the existence of property rights is confirmed using vindication and negatory action.

It is worth noting that this understanding is more typical for the countries where, at the legislative level, real claims do not have a specific division, but a general claim is fixed and referred to as a "claim from property" or "proprietary claim," which alone covers all possible cases of real rights' violations and challenges.

In the *fourth approach*, property rights recognition claims are considered a negatory action. For example, the Bolivian Civil Code consolidates the considered protection method as one of the requirements included in the subject of a negatory action. In Article 1455 of the Civil Code of Bolivia, entitled "Negatory Action", Point 1 states that "The legal owner may sue anyone who claims to have rights to property and ask to recognize the absence of such rights" (El propietario puede demandar a quien afirme tener derechos, sobre la cosa y pedir que se reconozca la inexistencia de tales derechos). Additionally, only Part 2 of Article 1455 of the Civil Code of Bolivia includes a more familiar characteristic of a negatory action, which is a demand to stop disorder or inconvenience; that is to say, the elimination of obstacles in the use of the property and restoration of the calm exercise of real rights.

Therefore, under this approach, there are no sufficient grounds to classify property rights recognition claims as negatory actions since the former eliminates the challenge to a right and the latter removes violation of rights. Challenging a right and violating a right are different legal facts. Methods of protection are also differentiated depending on the nature of the defendant's illegal actions. The possibility of using a negatory action as a means of protection against a challenge is not provided for in the legislation of Western European countries either. Point 1 of section 1004 of the German Civil Code states that "if the property right is violated in any way other than seizure or illegal deprivation of possession, then the owner may demand from the violator to eliminate the violation." Oddly enough, in German law, a claim for the recognition of property rights is qualified as a kind of negatory action.

In German law, negatory actions are mainly aimed at protecting the owner from the influence of third parties and are referred to as a claim for eliminating and omitting exposure (Beseitigungs und Unterlassung).

German researchers also noted the excessive universalization of the negatory action cas caused by expanding its scope. Gröschler writes:

> § 1004 BGB expands the action negatory, limited to individual cases of illegal use of the right, to a general claim to eliminate violations of property rights not related to deprivation of ownership, and further abstain from them. Thanks to their function of protective claims, at present, both the vindication claim from section 985 BGB and the claim from section 1004 BGB can be designated as negatory actions in a broad sense.[7]

In German civil law, real rights are protected by real claims, which include vindication claims and negatory actions. At the same time, while the vindication claim eliminates violations related to the deprivation of ownership, the negatory action suppresses all other forms of violation of property rights so long as they are not associated with the deprivation of ownership.[8] Collectively, vindication claims and negatory actions can eliminate the entire spectrum of possible property rights violations, and negatory action is given a universal meaning.

German legal thinking is characterized by a hypertrophied expansion of the scope of negatory protection through the subsidiary application of section 1004 of the German Civil Code to claims based on obligations,[9] such as the protection of personal non-property rights. In most cases, the need for subsidiary application of section 1004 of the German Civil Code arises due to the preventive function of a negatory action, which tries to guarantee the elimination of a repeated similar violation. Moreover, Wilhelm pointed out the applicability of a negatory action for liability rights,[10] and Habersak substantiated the idea of using a negatory action in corporate relations.[11]

This qualification of property rights recognition claims is the result of the legislator's inattention to the regulation of this claim and the fact that, in the codified acts, the scope of application of negatory action has historically been very broadly

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[7] Gröschler, P. (2010). Protection of property rights in Germany: Theory and practice. In *Civil studies. Vol. IV* (p. 374). Peleng. (In Russian).

[8] *See* Windscheid, B. (1870). *Lehrbuch des Pandektenrechts. Bd. 1* (pp. 546–547). Buddeus. (In German); Hochloch, G. (1976). *Die negatorischen Anspruche und ihre Beziehungen zum Schadenersatzrecht* (p. 26). A. Metzner. (In German); Picker, E. (1972). *Der negatorische Beseitigungsanspruch* (pp. 65–66). L. Röhrscheid. (In German); Wieling, H.J. (2006). *Sachenrecht. Bd. 1: Sachen, Besitz und Rechte an beweglichen Sachen* (p. 626). Springer. (In German).

[9] *See* Mager, H. (1993). Besonderheiten des dinglichen Anspruchs. *Archiv für die civilistische Praxis, 193*(1), 79. (In German).

[10] *See* Wilhelm, J. (2007). *Sachenrecht* (p. 51). De Gruyter. (In German).

[11] Habersack, M. (1996). *Die Mitgliedschaft: Subjektives und «sonstiges» Recht* (pp. 21–22). Mohr Siebeck. (In German).

defined to the extent that it includes independent protection methods that do not have the characteristics of a negatory action.[12]

Many countries, however, enshrine the *fifth approach* in their law, which is based on the idea that property rights recognition claims are a manifestation of vindication claims. With this understanding, the emphasis is on the fact that the defendant may object to the vindication requirement by having a real right to the subject of the dispute, which makes it necessary for the court to establish the right holder of the disputed property; that is, recognize the real right of one of the parties to the dispute.

Point 1 of Article 1311 of the Civil Code of Portugal "Vindication Claim" states: "The owner can in court demand the property from any occupier or holder, or demand the recognition of his ownership and the subsequent return of everything that belongs to him." Of particular interest is Point 2 of the same article, which raises the question of the relationship between a vindication claim and a claim for the recognition of property rights, stating: "After an individual is recognized as having ownership of property, he may be denied the return of this property only in cases provided for by law." This is most likely a reference to disputes on the right to real estate registered in the prescribed manner. However, point 2 of Article 1311 of the Civil Code of Portugal draws a borderline between these two claims, emphasizing that the subject of protection is different for them.

Article 1044 of the Latvian Civil Law of 1937 states: "The owner may bring a claim for property against anyone who illegally holds his property; its purpose is to recognize ownership and thereby grant ownership." The peculiarity of such regulation is that, in this legal system, the types of property claims are not differentiated. Instead, there is one single property claim, which can have varying legal effects when applied. This reflects the influence of the German legal doctrine, which discussed the idea of separating a single claim from the violation of property rights. From the provisions of Article 1044 it follows that the emphasis is on vindication, that is, the elimination of violations associated with deprivation of ownership.

Legislative regulation of property rights recognition claims is significantly influenced by the existence of a system for registering rights to real estate, the balance and competitiveness of the principle of introduction, and the idea of opposing registered rights. Therefore, a *sixth approach* can be proposed, which singles out a distinct type of claim focused on contesting the registered right and adjusting registration records. In the legislation of such countries, two property claims are usually enshrined–vindication and negatory, with the latter being broadly and abstractly formulated in the law, which makes it possible to formally qualify a claim as falling under the scope of negatory protection starting from the moment the right is registered.

The most canonical example of this type of approach is the provision of the Swiss Civil Code of 1907. Point 2 of Article 641 of the Swiss Civil Code states: "He or she has

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[12] For more details, *see* Podshivalov, T. (2019). Models of Actio Negatoria in the law of Russia and European countries. *Russian Law Journal, 7*(2), 128; Podshivalov, T. (2020). Conditions for satisfaction of negatory claim. *Tomsk State University Journal of Law, 36*, 189.

the right to demand it from anyone who detains it and to protect it from any unjustified interference." As evident, the subject of protection in a negatory action is defined broadly enough through the wording "any unjustified interference."

Article 661 of the Swiss Civil Code establishes the rule on the conditional indisputability of the registered right to real estate: "If an individual was mistakenly registered in the Land Registry as the owner of real estate, his or her ownership can no longer be contested if he or she owned it in good faith, continuously and without any problems for ten years." If the registration of the real right in the Land Registry is erroneous, the right can be contested; however, the presence of the composition of acquisitive prescription remediates and validates the basis for acquisition, and consequently, the already introduced real right becomes indisputable.

There is a special claim provided for in section 894 of the German Civil Code to adjust the registry of rights to real estate in the German law, which states:

> If the content of the land registry does not correspond to the actual legal position in relation to any right to a land plot or to the right to such a right, or to the restriction of the right to dispose of it, provided for in Article 892, Part 1 – the one whose right has not been entered at all, or entered incorrectly, or violated by the entry of a nonexistent encumbrance or restriction, may require the consent to the appropriate correction of the land registry from persons whose rights are affected by such a correction …

The claim for the correction of the registry entry is an essential prerequisite for approval of the land registry correction. By virtue of section 900 of the German Civil Code, the limitation period does not apply to claims for adjusting the registry: "The claims specified in Articles 894–896 are not extinguished by limitation." However, acquisitive prescription remediates the right to a land plot in the event that the registry entry in the land registry was recorded on an insufficient premise but at the same time it has existed for thirty years or more. This is provided for in section 900 of the German Civil Code, which says: "Anyone who is included in the land registry as the owner of a land plot, but is not such, acquires ownership if such a record existed for 30 years and during this time, he owned this land plot as his own."

More modern codifications contain a similar mechanism for resolving the issue of recognizing the property rights of real estate. For example, the Estonian Law on Property Rights 1993, Part 1 of Article 56 consolidates the presumption of fidelity of the registered right: "It is assumed that the data entered in the land registry are deliberately correct." The second part of this article allows the cancellation of an incorrect entry: "In the event of cancellation of a right entered in the land register, it is assumed that the right has been terminated." This issue is regulated in more detail in Article 65 of the Estonian Property Law Act 1993, where the first and third parts contain the following rules:

> An individual whose right has been violated by an incorrect entry may require the consent of the person whose rights are affected by the correction to correct the incorrect entry ... The requirements specified in Part 1 of this Article

may not be made in relation to real rights acquired by a bona fide third party and entered in the land register.

Article 89 of the 1993 Estonian Property Law Act contains the most universal wording of a negatory action: "The owner has the right to demand the elimination of any violation of property rights, even if this violation is not related to the loss of ownership." According to Article 80 of the Estonian Property Law Act, acknowledging the right is considered a manifestation of vindication when it precedes vindication, thereby confirming that the claimant has the right to the disputed property.

This form of regulating the recognition of real rights is also characteristic of civil laws adopted relatively recently. For example, Part 2 of section 980 of the Czech Civil Code of 2012 (entered into force in 2014) reads: "If the right to property is included in the publicly available list, it is considered that it was registered in accordance with the actual legal situation. If the right to property has been removed from the public list, then it is considered that it does not exist." In the event of competition between two rights to one real estate, priority is given to a bona fide acquisition, which is enshrined in Point 1 of section 984: "If the state registered in the publicly available list does not correspond to the actual legal status, then the registered state testifies in favor of the person who acquired the real right on behalf of an individual authorized to do so in accordance with registered law."

At the same time, the Civil Code of the Czech Republic in section 1042 secures only two real claims – vindication and negatory. It formulates a negatory action on the residual principle in comparison with vindication: "The owner has the right to demand protection from anyone who illegally interferes with his property rights or hinders him otherwise than with property."

Article 1.247 of the Civil Code of Brazil contains the following rules for contesting the registration of title to real estate: "If the content of the record does not express the truth, the interested party may demand that it be corrected or canceled. Once the registration has been canceled, the owner can claim the property, regardless of the good faith or title of the third-party purchaser."

In the presence of mandatory registration of rights to real estate, disputes most often arise in situations where one of the parties to the dispute has a stronger position since they are listed in the registry as the owner. It is rare but possible that both parties to a litigation claim cannot prove their rights to a real estate property, and neither of them is listed as the registered owner. Two models for the claims can be applied to resolve such a dispute. The first model, which is found in German law, is based on *actio spolii*. The second model, enshrined in section 372 of the Austrian General Civil Code, is based on the *actio Publiciana*, wherein the dispute is resolved quite simply, by granting priority to the party who owns the property.

In the *seventh approach*, property rights recognition claims are treated as independent real claims. Article 912 of the Civil Code of the Canadian province of Quebec (Code civil du Quebec) establishes that the owner and holder of other property rights can apply to the court for their right to be recognized (Le titulaire

d'un droit de propriété ou d'un autre droit réel a le droit d'agir en justice pour faire reconnaître ce droit).

The Civil Code of the People's Republic of China (中华人民共和国民法典) 2021 refers to a claim for the recognition of a right *in rem* (Art. 234 of the Civil Code states: "Where a dispute arises over the attribution or contents of a real right, an interested person may request for confirmation of the right" – 因物权的归属、内容发生争议的，利害关系人可以请求确认权利), a vindication action (Art. 235) and a negatory action (Art. 236). It is important to note that the claim for recognition of a right *in rem* is at the top of the list of actions *in rem*.

The possibility of applying property rights recognition claims to both movable and real estate is provided for in the legislation of the Republic of Cuba. Point 3 of Article 129 of the Civil Code of Cuba, 1987 (Codigo civil de Cuba) says: "The legal owner may also demand recognition of his rights by the competent authority of jurisdiction and registry it in the appropriate register" (El propietario puede también solicitar el reconocimiento de su derecho por el órgano jurisdiccional competente e inscribirlo en el correspondiente registro). This rule emphasizes that property rights recognition claims can be a means of correcting a registration record and the basis for registering a right to real estate.

The Civil Code of Spain (Código Civil de España) 1889 does not consolidate property rights recognition claims, focusing mainly on the vindication claim (Art. 348), the claim for delimitation (acción de deslinde, Art. 384), and the claim for the establishment of fences or enclosing structures (acción de cerramiento de fincas, Art. 388). The remaining property claims–the negatory claim, the confessional claim, and the claim for recognition of property rights–are derived by doctrine and judicial practice from the idea of freedom of property and its inviolability. In the scientific literature on real estate law, it is indicated that the owner has a special claim for the recognition of ownership (la acción declarativa de la propiedad), which is a kind of declarative claim for the recognition of rights (acción declarativa).[13]

This confirms the existence of property rights recognition claims in Spanish law. It should be noted that the legislative regulation of this claim is influenced by the legislation on real estate. Article 40 of Spain's Mortgage Law (Ley Hipotecaria), 1946 establishes a claim for the rectification of the Registry (acción de rectificación del Registro). Moreover, the doctrine of the Spanish civil law, based on Article 41 of the Mortgage Law, distinguishes between real registration claims (acción real registral), which can only be filed against an individual who, without possessing a registered title, contests the above real right or interferes with its implementation.

The civil codes of several countries bordering the Russian Federation contain property rights recognition claims in the sections devoted to protecting real rights. For example, in Article 157.1 of the Civil Code of Azerbaijan, Article 273 of the Civil

[13] *See* Penco, A.A. (2016). *Derechos reales y derecho inmobiliario registral* (pp. 125–126). Dykinson. (In Spanish).

Code of Armenia, Article 259 of the Civil Code of Kazakhstan, and Article 321 of the Civil Code of Tajikistan, the first proprietary remedy, indicates property rights recognition claims, securing the owner's authority "to demand recognition of the property right." In particular, Article 392 of the Civil Code of Ukraine specifies: "The owner of the property can file a claim for the recognition of his ownership, if this right is disputed or not recognized by another person, as well as in case of loss of the document certifying his ownership."

The Estonian Law on Real Rights of 1993 provided Article 81, which secured the claim to recognize the real right, but this article became invalid in 2003. This might have occurred due to the development of the registration system of rights to real estate since property rights recognition claims are most often used to resolve the ownership issues related to real estate rights.

3.2. Property Rights Recognition Claims in Common Law Countries

Analogs of property rights recognition claims can be found in the laws of countries with legal systems based on common law. The common law model was based on Roman law and was founded on the casuistic Institutes of Gaius. From this stems the very absence of the classic pandect division of civil law into real claims and obligations, which is characteristic of the law of countries that later received Roman laws, in particular the Digest of Justinian. Therefore, in countries that follow the common law system, tort claims can be applied to protect against the violations of property rights based on a variety of offenses (torts): dispossession; violation of possession that did not entail its deprivation (trespass); violation that does not allow the normal use of real estate (nuisance); retention (detinue, detainer); and conversion.

It is important to understand three features of these claims that distinguish them from the property claims in countries belonging to the Romano-Germanic legal family. First, the specified instruments are tort claims, not property claims. Second, monetary compensation is awarded for these claims, either in the form of compensation or the situation preceding the violation is restored, such as the return of possession or the removal of an obstacle in exercising the right to property. Third, these claims are considered property claims; that is, they can be declared by an individual who has any title to the property, given that the individual can prove the legality of their possession of the property.

The instrument closest to property rights recognition claims is the claim for conversion, in which the defendant ascribes and appropriates the ability to dispose of the property.[14] A claim for the conversion is only applicable to movable property,

[14] *See* Curwen, N. (2006). The remedy in conversion: Confusing property and obligation. *Legal Studies, 26*(4), 571; Lee, P.-W. (2009). Inducing breach of contract, conversion and contract as property. *Oxford Journal of Legal Studies, 29*(3), 512; Douglas, S. (2011). The scope of conversion: Property and contract. *Modern Law Review, 74*(3), 329; Dyson, M. & Green, S. (2014). The properties of the law: Restoring personal property through crime and tort. In M. Dyson (Ed.), *Unravelling Tort and Crime* (pp. 389–390). Cambridge University Press.

not real estate, and the corrected violation consists in the appropriation for one's own movable property, to which another person has the direct right to possess or use.

In common law, property rights have a fundamental division depending on the object of the right; for instance, there are separate rights to real estate, and a separate regime is established for the rights to movable property. In contrast to this, the laws of countries using the Romano-Germanic system attempt to unify property rights to movable property and real estate. The applicability of a claim for conversion solely to movable property is due to the peculiarities of the registration system of rights to real estate in common law countries, where the degree of the deposit principle is high, and registration creates the indisputability of the right to real estate, which in turn significantly complicates the possibility of contesting the registered right. This is quite difficult for us to understand since the Russian system of real estate registration is built on a model where the principle of entry and the principle of opposition operate simultaneously and are equivalent. The only proof of the right to real estate is an entry in the registry, which can be contested in court, not as an exclusive measure but as general rules applicable for the challenge of any civil right. Therefore, a conversion claim is not needed to protect property rights in common law countries.

The scope of a conversion claim is most often determined by a situation in which the copyright holder lost movable property, and the defendant appropriated it for themselves by impersonating the copyright holder, performing actions that can usually only be performed by an individual who has the right to the property. Consequently, in a conversion claim, the defendant owns the property and considers themselves entitled to it, while the plaintiff requires the court to establish that it is the plaintiff who has the real right to this property and that it be returned. Additionally, a dispossession claim is applied in cases when the offender unlawfully took possession of the property but did not arrogate to themselves the right to it and impersonate its copyright holder.

For conversion claims, it is not important whether the defendant acquired possession of the items legally or illegally. The main requirement is the desire of the defendant to appropriate the right to movable property; this distinguishes it from dispossession.

The scope of the claim for conversion is also much wider than the Russian claim for recognition of the real right since it covers claims for damages and the award of the full value of the property. In this regard, it can be highly advantageous to understand the protective effect of this requirement in common law, as it pertains to a claim arising from an offense that engenders obligations, that is, tort requirements. Of all the types of claims, the claim for conversion is closest to the Russian claim for recognition of the real right since it is based on the fact that the defendant, by their actions, assigns a title to movable property, thereby contesting the claimant's right. A claim to property constitutes a violation of the type of conversion in cases when the defendant arrogates to themselves the ability to dispose of property, destroy it, transfer the right to it, or pledge it.

The applicability of a claim for conversion when contesting the right to property of a particular individual is also noted in the legal literature. Lusk writes that in US civil law, a conversion violation is "the exercise of illegal domination over the movable property of another person or illegal seizure of someone else's movable property," while this claim eliminates a violation that "is incompatible with the right of ownership or other rights this other person to this property, or is aimed at denying these rights."[15]

The common law analog of property rights recognition claims is only applicable in relation to movable property not because of what happened historically in these countries, or not because of the voluntaristic decision of the legislator, but rather because of the specifics of the registration system. In other words, by virtue of the indisputability of a registered right to real estate, there simply cannot arise a situation when property rights recognition claims might be needed to correct the registration record. The indisputability of such a right, nevertheless, is not absolute, and such a right can be challenged, although only in exceptional cases; however, this is more commonly associated not with civil transactions but with criminal offenses.

If an individual claims that they have the right to a real estate that is registered with another person, it constitutes a violation referred to as a malicious and knowingly unjustified defamation of a legal title or slander of title.[16] In essence, this is a denial of title, particularly in a situation where the principle of deposit is most consistently introduced as the basis for registering rights to real estate, that is to say, when the registration record is the only proof of the existence of a right to a real estate. With such a legal interpretation of registration of rights to real estate, the statement of an individual that they are the holder of the right to property registered for another person cannot be assessed and qualified in any way other than libel.

It is important to emphasize the focus of the claim on the slander of title in order to prohibit the further dissemination of information that would introduce uncertainty in the question of the authenticity of a particular person's title to real estate and the quality of this title. In essence, the Russian property rights recognition claims have a similar focus when the property rights owner goes to court to prove the reliability and quality of their title.

The presence of malicious intent on the part of the defendant can be refuted by evidence that the defendant considered themselves to be acting lawfully. For example, the defendant unknowingly committed slander of title and could not have known that their subsequent statements were not truthful. However, considering the openness and public reliability of the registration of rights to real estate, such

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15 Lusk, H.F. (1957). *Business law: principles and cases*. Irwin.

16 *See* Moss, W. (1960). Practice and procedure-right to appeal from a judgment in a jactitory action. *Louisiana Law Review, 20*(4), 787; Garrett Power, Power, G. (2002). Palazzolo v. Rhode Island: Regulatory takings, investment-backed expectations, and slander of title. *Urban Lawyer, 34*(2), 313–314; Ritchie, Z. (2013). A fresh look at an old tort: Litigating slander of title in mineral disputes. *West Virginia Law Review, 115*(3), 1125.

ignorance of the existence of registration of rights for the plaintiff is unlikely, even though it is not excluded.

In the most general terms, property rights recognition claims are known to common law through tort claims arising from two possible violations, namely conversion and slander of title; the first concerns movable property, while the second concerns real estate.

In the legal systems of foreign countries, procedural legislation plays a significant role in a claim for the recognition of property rights. Property rights recognition claims are declarative claims. In countries using Romano-Germanic law, qualifications are made according to the substance of the claim (declaratory, establishment, and announcement), while in countries with common law, they are determined by court decision (declaratory judgment).[17] At the same time, in common law systems, a claim for recognition is the preliminary stage in the consideration of a claim for an award to determine whether there is a subjective right to the protection sought by the plaintiff, as was the case in Roman private law with *actiones praeiudicialeso*. This connection between the common law declarative claim and the Roman *actiones praeiudicialeso* emphasizes the British adoption of the Roman private law, although not the postclassical stage (as was the case with the countries of the Romano-Germanic law) but the classical stage of its development.

In the legal systems in England and the United States, recognition of the right in question is an integral (intermediate) part of the award. In fact, the recognition of the right is a separate element to be established before the court makes a final verdict to resolve the dispute. This is due to the absence of any significant study of this method of protection by the civil law scientists of these countries.

German literature on property rights emphasizes that the holder of a property right can bring forth a claim for recognition,[18] which refers to the procedural version of the claim and not the property claim we are examining as a substantive claim. The claim for recognition in German law is referred to as "Feststellungsklage" and can be translated as a declarative claim or a claim for establishment. Recognition of law in Germany is an institution of procedural, not substantive law, while its significance is of a legitimate nature – a form of protection that serves to eliminate doubts in legal relations. Part 1 of section 256 of the German Civil Procedure Code (Zivilprozessordnung der BRD) states:

> In order to establish the existence or non-existence of a certain legal relationship, in order to recognize the authenticity of a document or in

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[17] *See* Ritchie, L. (2008). Re-evaluating declaratory judgment jurisdiction in intellectual property disputes. *Indiana Law Journal, 83*(2), 957; Robeck, M. & McNabb, J. (2011). Pennsylvania court raises questions about Marcellus shale gas ownership. *Oil and Gas Journal, 109*(18), 78–79; Chiang, E. (2015). Reviving the declaratory judgment: A new path to structural reform. *Buffalo Law Review, 63*(3), 549; McIntyre, J. (2016). The declaratory judgment in recent jurisprudence of the ICJ: Conflicting approaches to state responsibility? *Leiden Journal of International Law, 29*(1), 178.

[18] *See* Westermann, H., Gursky, K.-H., & Eickmann, D. (2011). *Sachenrecht* (p. 4). C.F. Müller. (In German).

order to establish its falsification, a claim may be brought if the plaintiff has a legal interest in the legal relationship or the authenticity or forgery of the document was soon established by a court decision.

We can draw several conclusions from our study. First, property rights recognition claims are clearly present in the laws of countries of the Romano-Germanic legal family – in several countries these claims are enshrined at the legislative level, while in other countries, they are formulated at the level of judicial practice and recognized in doctrine. In many countries, this claim is associated with a claim from the registration of rights to real estate. Second, in countries of the common law, analogs of property rights recognition claims can be found in the system of tort claims and can arise from two possible violations – conversion (appropriation) and slander of title. Third, property rights recognition claims are often qualified as declarative claims, which are legislatively enshrined in the laws of numerous countries in acts related to civil proceedings.

4. Discussion: Perspectives on the Study of a Property Rights Recognition Claim

We can conclude that property rights recognition claims are enshrined in the laws of the majority of developed legal systems. However, they have different names in the laws of different countries and different conditions of application.

The implications of this study have less impact on practice than on theory. This is explained by the fact that for developing and improving judicial practice or the administrative practice of the registration authority, the unity of academic opinions on the nature of property rights recognition claims is necessary. However, such unity of academic doctrine is possible only in the future, with the further development of research on property rights recognition claims and procedures to correct registration errors.

In future research, it might be possible to consider the general characteristics of property rights recognition claims, the conditions necessary for these claims, their relevance with regard to the limitation of actions, the order of execution of court decisions on the recognition of property rights, and the determination of the legal basis for the proper application of property rights recognition claims.

The principles of civil law, namely the principle of inviolability of property, the principle of the inadmissibility of arbitrary interference in private affairs, and the principle of legal certainty, provide the normative basis for the application of property rights recognition claims. The principle of inviolability of property stipulates that unauthorized persons cannot interfere with the exercise of property rights. The prohibition of arbitrary interference in personal disputes allows one to guard against arbitrary denial of the existence of property rights and their challenges.

The principle of legal certainty directly determines property rights recognition claims since it aims to introduce certainty into the issue of ownership of a specific

person over the disputed property. In the majority of countries, the principle in question is not established at the legislative level, but rather, it is formulated at the level of scientific doctrine.[19]

The principle of legal certainty has its own content, which consists of the following ideas. First, the principle of legal certainty manifests itself in the desire to consolidate generally understandable, clear, and precise rules. Ideally, the legislator expects that the participants in legal relations are rational individuals. However, individuals are emotional by nature, and this circumstance should be considered when forming legislation. Second, legal certainty consists in the presence of clarity regarding the rights and obligations in a particular civil legal relationship and the idea of their legal status. Third, the construction of legitimate expectations (which includes legal expectations, reasonable expectations, and legitimate expectations) constitutes an integral part of the principle of legal certainty. The principle of legal certainty mandates that reasonable expectations of persons whose rights and (or) obligations may be affected by a specific civil legal relationship must be met. The term "legitimate expectation" was first used by Lord Denning in the case of *Schmidt vs. Secretary of State* in 1968. In a judicial ruling, Lord Denning indicated that, in addition to the subjective right and legitimate interest, the legitimate expectations of an individual are also subject to protection.[20] Fourth, legal certainty consists of the predictability of legislative regulation and law enforcement. This is what stabilizes the civil turnover, allowing the participants to plan their activities. Fifth, the principle of legal certainty is one aspect of the rule of law.

The most argued approach to the qualification of the claims analyzed in the Romano-Germanic law system is to define the claims as independent property claims, existing on a par with vindication claims and negatory actions. However, without defining this claim as independent, it is impossible to give a legal qualification to the owner's claims in several situations since they cannot be brought under another property claim in cases where the plaintiff only seeks to establish that rights to the property belong to him but does not require the defendant to fulfill any obligations, such as, for example, return the property or eliminate the consequences of a violation. Legally, such claims can only be qualified as property rights recognition claims

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[19] *See* Wade, H.W.R. (1941). The concept of legal certainty a preliminary skirmish. *Modern Law Review, 4*(3), 183; Alexy, R. (2015). Legal certainty and correctness. *Ratio Juris, 28*(4), 441; Squintani, L., & Rijswick, M. (2016). Improving legal certainty and adaptability in the programmatic approach. *Journal of Environmental Law, 28*(3), 443; Portuese, A., Gough, O., & Tanega, J. (2017). The principle of legal certainty as a principle of economic efficiency. *European Journal of Law and Economics, 44*(1), 131; Okoli, P. (2018). English worldwide freezing orders in Europe: A pragmatic search for legal certainty and the limits of judicial discretion. *European Journal of Comparative Law and Governance, 5*(3), 250; Perinetto, P.A. (2019). Intent and competition law assessment: Useless or useful tool in the quest for legal certainty? *European Competition Journal, 15*(1), 153; Huhta, K. (2020). Anchoring the energy transition with legal certainty in EU law. *Maastricht Journal of European and Comparative Law, 27*(4), 425.

[20] Lord Justice Laws. Lecture III: The Common Law and Europe (Hamlyn Lectures, November 27, 2013). http://www.nottingham.ac.uk/hrlc/documents/specialevents/laws-lj-speech-hamlyn-lecture-2013.pdf

because their purpose is to formalize an already existent and established right to a disputed property. This claim initiates a dispute, which determines the ownership of the disputed property.

Property rights recognition claims aim to protect the rights of an owner from third parties who are not connected with the owner by any obligation. These claims initiate a dispute that determines the ownership of the disputed property. The claim for the recognition of a proprietary right protects this right directly, confirming its indisputability and introducing certainty into the question of whether the plaintiff has a proprietary right. This indicates both the real nature of the claim in question and the need to qualify it as an independent real claim.

The following special features thus characterize property rights recognition claims: (a) the plaintiff has legal possession of the subject of the dispute; (b) the real right was acquired by the plaintiff on a sufficient legal basis and continues to exist at the time of the consideration of the dispute; (c) there exists legal uncertainty regarding the ownership of an individual's property rights; (d) the presence of a defendant contesting the real right of the plaintiff; (e) exceptional application; (f) the actual application of property rights recognition claims has independent legal significance; (g)the claim is non-contractual in nature; (h) the legal uncertainty concerns an individually defined property (in the overwhelming majority of cases– real estate), which physically exists at the time of the court's decision; and (i) the claim must be restorative.

Property rights recognition claims have a legal character, as their application confirms the existence of a subjective real right of the plaintiff to the disputed property that arose earlier, although the existence of the right may not be obvious to all participants in the civil circulation. These claims, due to their unique legal nature, form an independent type of real claim, specifically a claim for the acquisition (establishment) of property rights. Moreover, a claim for acquiring a proprietary right constitutes a proprietary claim of title. Additionally, these two claim types differ in their legal implications, as they serve to either confirm the existing property rights or establish property rights.

Further research on property rights recognition claims can raise the question of how to harmonize the legislation on this method of protecting the right to property in different countries. Since unification is not possible in property rights matters through the development and ratification of an international treaty, harmonization is the only remaining option, wherein countries unilaterally approximate their national legislation.

Moreover, the laws of most countries already contain property rights recognition claims typically related to contesting a right to real estate registered in the registry.

In the laws of the countries of the European Union, an attempt is made to grandiose harmonization of European private law, within which the Model Rules of European Private Law have been developed through the Draft Common Frame of Reference (DCFR; Principles, Definitions and Model Rules of European Private Law).

In 1998, an international study group devoted to research on the European Civil Code started work under the leadership of German professor Christian von Bahr. By 2008, the result of the work was published–the DCFR, which is a draft of the Civil Code of the European Union.

As part of harmonizing the private law in the European Union, it has been proposed to unify methods for protecting property rights and, *inter alia*, to provide for the possibility of applying property rights recognition claims. Chapter 6, entitled "Protection of Property Rights and Possession" of Book VII, "Acquisition and Loss of Ownership of Property" of the Model Rules of European Private Law, includes Article VIII.-6: 101, "Protection of Property Rights," Part 2, which states: "Where another person interferes with the owner's rights as an owner or where such interference is imminent, the owner is entitled to a declaration of ownership and a protection order." This article enshrines the vindication claim in the first paragraph and Part 2 – negatory action and property rights recognition claims – by outlining the result of protection against interference with the owner's rights.

Part 3 of Article VIII.-6: 101 of the Model Rules of European Private Law delineates the types of claims that fall under an order for the protection of property rights, noting that "A protection order, an order which, as per the circumstances, may be required: (a) prohibits imminent future interference; (b) orders the cessation of existing interference; (c) orders the removal of traces of past interference."

Based on the provisions of the Model Rules of European Private Law, it is noted that there is a tendency to separate property rights recognition claims from vindication and negatory actions, making the mentioned claims independent.

Conclusion

The following main conclusions can be drawn from our study:

First, the initial hypothesis that property rights recognition claims are known only to some legal orders was incorrect. Property rights recognition claims are part of the laws of the majority of countries with a developed legal order. This instrument of judicial correction of errors in the registration of a title is being used in numerous countries where the registration system allows for the registration of titles rather than real estate deeds.

Second, the main difficulty is that this claim is referred to by various different terms in legal texts, thereby complicating comparative legal research. If we proceed not from the terms of the claims but instead focus on the main purpose of these claims, which is to correct an error in the registry of rights to real estate, then property rights recognition claims become more understandable.

Third, property rights recognition claims clearly exist in the laws of countries that belong to the Romano-Germanic legal family–in several countries, these claims are enshrined at the legislative level, while in other countries they are formulated at the level of judicial practice and recognized in the doctrine. In many countries, this

type of claim is either associated with or part of a claim related to the registration of rights to real estate.

Fourth, analogs of property rights recognition claims are found in common law countries as well; however, these instruments are applied in the system of tort claims that arise from two possible violations – conversion (appropriation) and slander of title.

Fifth, property rights recognition claims are often qualified as declaratory claims and are legislatively enshrined in the laws of many countries as a matter of procedural law.

Sixth, the legal basis for the claim for the recognition of real rights is formed by the principle of legal certainty. This principle aims to meet legitimate expectations of the plaintiff, who is petitioning for the correction of the erroneous entry in the real estate registry through claims for the recognition of real rights.

Seventh, within the process of harmonizing European law, discussions are already underway regarding the unification of the instruments that are used to protect real rights, including the possible application of claims for the recognition of real rights. In Chapter 6 of Book VII of the Model Rules of European Private Law (entitled "Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference"), Article VIII.-6:101 has been introduced. Based on the provisions of the Model Rules of European Private Law, this demonstrates the inclination and desire to separate claims that recognize real rights as distinct from vindication and negatory claims, thereby affirming the independent nature of claims for recognition.

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