The rationale of publicity in the law of corporeal movables and claims

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1 Introduction: Context, Question, Methodology and Outline

1.1 The Research Context and Questions

1.1.1 General Context: Property Rights, Third Parties, Information and Publicity

The law of patrimony (in Dutch *vermogensrecht*, in German *Vermögensrecht*) takes the distinction between property rights (rights *in rem*) and personal rights (rights *in personam*) as its structural basis. The prominent difference between these two types of rights lies in the breadth of enforceability: property rights can bind third parties, while personal rights only have an effect *inter partes*. This broad enforceability of property rights makes publicity become a principle in the law of property. As the starting point, every property right should have a form of publicity so that third parties can easily know of the existence and content of this right. From the perspective of information economics, publicity is a way of addressing the problem of information asymmetry, a problem that can be triggered by the broad effect of property rights.[1] Information asymmetry arises when one party has more or better information than another party, especially under the circumstance of the conveyance of property. In the aspect of knowing of the proprietary relationships over a thing which is going to be transferred, the potential transferee, compared with the transferor, is often in a disadvantageous situation. For the transferee, there is always a burden of investigating, *inter alia*, whether the transferor has authority to transfer and whether there is any proprietary encumbrance over the thing. In general, publicity allows the transferee to obtain relevant information, alleviating this burden to a large extent.[2]

In general, there are different types of third parties against whom property rights are enforceable. One type of third party's demand for information may differ from another type of third party's demand. For example, general creditors may have no interest in knowing the proprietary legal relationships with respect to a certain asset of the debtor, while a potential acquirer often investigates the legal relationships regarding the

1 Arruñada 2011, p. 238-239.

2 For example, if A wants to buy a house from B, he needs to investigate whether B has ownership of this house and whether the house has been mortgaged. In general, B owns more information than A, and A is in a disadvantageous situation. However, by searching the land register, A can collect relevant information and avoid this situation to a large extent.

asset. Hence, the discussion of publicity in the law of property has to be conducted on the basis of the categorization of third parties. The different demands for information by different types of third parties may influence the scope of the legal effect of publicity. Failure to perform publicity perhaps means that the property right has no effect over one type of third party, but the right might still be able to be effective against another type of third party. For example, where a bicycle is transferred under the declaratory system, ownership of this bicycle passes to the transferee upon the effect of the agreement.[3] In the absence of delivery, a method of publicity for corporeal movables, the transferee is protected from the illegal act by thieves, one type of third party, but the ownership acquired may be ineffective against a subsequent buyer acting in good faith, another type of third party. Therefore, we need to pay attention to the specialty in the aspect of the demand for information by different types of third parties.

Unlike property rights, personal rights (or claims) are not subject to the principle of publicity. This is because the parties of a personal right already know the details of this right. However, it should be noted that personal rights have the same problem of publicity as property rights once they are included in transactions (such as assignment and pledge) and taken as an object of disposal. This problem is considered by some writers as an example showing that personal rights have a "proprietary status (*goederenrechtelijk statuut*)" or a proprietary aspect.[4] Like tangible things (such as bicycles), personal rights, which are intangible *per se*, also have a problem of "belonging (*toebehoren* or *Zuordnung*)" when they are seen not only as a legal relationship between the debtor and the creditor, but also as a type of asset that can be alienated and pledged. When a claim is assigned to another person, the question arises of whether the assignor has full authority of disposal. This question concerning the authority further affects the possibility of the assignee becoming the new creditor and obtaining the performance. For example, if a creditor assigns a claim to two different persons, which person can require the debtor to perform the debt and preserve the performance? In a nutshell, like the disposal of tangible things, the disposal of personal rights is also linked to the principle of publicity.

Generally speaking, the form of publicity is determined by the nature of the object of property rights. "Public registration" is used to publicize proprietary interests in immovable property as well as some special movable

3 Under the declaratory system, publicity is not a condition for the acquisition of property rights and only "declares" property rights to third parties. In general, what matters is the parties' consent. Therefore, this system is also known as consensual system. However, publicity might be necessary for a property right acquired to be effective against some third parties with competing rights. See Sagaert 2008, p. 18. The declaratory system forms a contrast to the translative system, which is shown below (see 1.3.4) and discussed in detail in Chapter 5 (see 5.1.4.1).

4 Lebon 2010, p. 4; Lubbe 2006, p. 316.

things, such as vessels and aircraft. Here, public registration refers to registration that is made available to the public, especially third parties in the law of property. Not all registration is public. For example, the register for the non-possessory pledge and undisclosed pledge in Dutch law is not available to third parties (art. 3:237 and 3:329 BW).[5] In this research, the system of registration not made available to the public is called "private registration", as opposed to public registration. It is commonly accepted that public registration is an eligible method of publicity. At present, the main issue is how to define the legal effect of, and improve the efficiency of, this method of publicity.[6] Publicity of immovable property is beyond the scope of our research. It will be referred to, only when necessary, as an illustration in discussing the publicity of movables, the theme of this research.

Here, the term "movables" (or movable things, movable property) is used in a very broad sense. It not only covers tangible things that are not immovable (such as bicycles), but also intangible things, such as claims, shares (stocks), and intellectual property. This way of use is alien to German and Dutch lawyers. In German law and Dutch law, movable things (*bewegliche Sachen* in German law and *roerende zaken* in Dutch law) are necessarily corporeal.[7] In English law, however, movable things are divided into two categories: corporeal movables and incorporeal movables. Things, which are neither immovable property nor corporeal movables, are covered by the term incorporeal movables.[8] As a result, incorporeal movables include a large number of assets, such as claims, intellectual property, and shares. In this research, the term "movables" is used as in English law: it covers both tangible and intangible things that are not immovable property.

However, as the title of this dissertation shows, we do not include every type of movable within this research. Only corporeal movables and claims are included. In addition to claims, incorporeal movables also include intellectual property, shares, and emerging intangible property, such as carbon emissions units[9] and agricultural products quotas.[10] These incorporeal movables differ significantly in nature as well as the way of transactions. Moreover, the other types of incorporeal movables (such as intellectual property and shares) are regulated by special laws (such as intellectual

5 Heilbron 2011, p. 44.

6 Dekker 2003, p. 116.

7 Wieling 2007, p. 21; Snijders and Rank-Berenschot 2017, p. 20.

8 Bridge, Gullifer, McMeel and Worthington 2013, p. 10.

9 Cole 2016, p. 10. There is a system of registration for the transaction of carbon emissions units. However, the register is not open to the public, and this type of property is not "registerable property (*registergoederen*)" under Dutch law. See Snijders and Rank-Berenschot 2017, p. 44.

10 Quotas are a device used by the government to control production, importation, exportation and so on. For example, this device is used by the European Communities to control the production of milk and livestock. The milk quotas and livestock quotas are tradable and deemed by some scholars as a type of property. See Cardwell 2000, p. 168.

property law, company law and the law of securities), and the problem of publicity has been addressed to a large extent.[11] For the sake of comprehensiveness, "documental rights" concerning corporeal movables (such as warehouse receipts) and payment (such as bills of exchange) are included in this research. This type of right is documental because the right is embodied in a document or security. Securities to corporeal movables are often termed securities to or document to "goods (*Gütern* in German)".[12] In this research, goods are defined to be corporeal and movable. This term is used in the discussion of securities to goods (see 4.2.2). In general, securities still play a role in transactions involving corporeal movables and claims. For example, the transfer of things stored in a warehouse is usually associated with the transfer of the warehouse receipt, and the alienation of the claim embodied within a bill of exchange is, in principle, dependent on the transfer of the bill of exchange *per se*.

1.1.2 Question I: Is the Principle of Publicity Tenable?

At present, a main problem concerning the principle of publicity is whether this principle remains tenable in the law of corporeal movables and claims. Specifically speaking, whether the existing means of publicity can sufficiently support the saying that the principle of publicity is still tenable. Traditionally, possession is treated as a method of publicity for the transaction of corporeal movables,[13] and notification to debtors is treated as a method of publicity for the disposal of claims in some jurisdictions.[14] However, are these two methods qualified as a means of publicity?

Possession is a complicated concept, a concept used with different meanings in different jurisdictions. For example, there is a distinction between "possession (*bezit*)" and "detention (*houderschap*)" in Dutch law: possession is detention for oneself.[15] German law, however, prescribes a broader concept of "possession (*besitz*)" and differentiates "ownership possession (*Eigenbesitz*)", "limited-right possession (*Fremdbesitz*)" and "control

11 Nowadays, registration has been used in transactions concerning uncertificated shares and debentures (bonds). Moreover, these securities are registered in electronic accounts and transferred through a central exchange system which operates electronically. This is known as the phenomenon of "*dematerialisation*" of securities. See Haentjens 2007, p. 33. A system of registration for intellectual property, especially patents and trademarks, has already been constructed and operates well in the practice. See WIPO 2012, p. 22-23.

12 Bridge, Gullifer, McMeel and Worthington 2013, p. 841; Zöllner 1978, p. 4-5.

13 Clarke and Kohler 2005, p. 390; Wolf and Wellenhofer 2011, p. 76; Snijders and Rank-Berenschot 2017, p. 63.

14 DCFR 2009, p. 1076; Guest and Liew 2018, no. 6-06; Von Wilmowsky 1996, p. 392; Snijders and Rank-Berenschot 2017, p. 302.

15 Rank-Berenschot 2012, p. 13-14.

by agents (*Besitzdienerschaft*)".[16] The distinction made by Dutch law cannot be found in English law. Like German law, English law also has a broader concept of possession which, on the other hand, does not include a distinction between ownership possession and limited-right possession.[17] In this research, the concept of possession is used in a wide sense, not only including possession by owners, but also possession by lessees, pledgees and the like. The differences just mentioned are related to the possessory intention (*animus*). This implies a question regarding publicity: whether possession can independently show the intention, which is invisible, to third parties. In other words, for example, can a third party distinguish ownership possession (or *bezit* in Dutch law) from limited-right possession (or *houderschap* in Dutch law) only on the basis of possession *per se*?

In addition to viewing possession from the aspect of possessory intention, we can also analyze the concept according to the element of factual control (*corpus*). Possession can be either visible through factual control by the possessor himself or invisible as a result of factual control by another person than the possessor himself. In the jargon of law, possession can be direct (actual) or indirect (constructive). Indirect possession, often deemed as "mental control (*vergeistigte Sachherrschaft*)", means that the possessor does not factually control the object in a direct way.[18] Because of the absence of direct control, indirect possession is invisible.[19] This casts doubt on the capability of indirect possession to show property rights to outsiders. Direct possession is also open to criticisms, despite the fact that the direct possessor himself often exercises factual control. In the viewpoint of some scholars, even direct possession is too ambiguous to qualify as a means of publicity.[20] This criticism is raised against the background that corporeal movables are transacted in a great variety of ways nowadays, such as reservation of ownership, transfer of ownership for security reasons, and lease. Typically, the qualification of possession as a method of publicity is questioned because it triggers a problem of "*ostensible ownership*" or "*false wealth*" in the secured transaction in corporeal movables: possession is no longer a method of publicity, but a source of misleading information.[21]

16 Baur and Stürner 2009, p. 89. Here, "ownership possession" means factual control by the owner, "limited-right possession" refers to factual control on the basis of a limited right, while "control by agents" is used in the situation where an agent holds factual control on behalf of and subject to the instructions of ownership possessors or limited-right possessors. A detailed discussion of the concept of possession is provided in 3.1.

17 Bridge, Gullifer, McMeel and Worthington 2013, p. 55.

18 Wolf and Wellenhofer 2011, p. 82.

19 Quantz 2005, p. 41-42.

20 Hamwijk 2012, p. 310-311; Füller 2006, p. 280.

21 Baird 1983, p. 54; Drobnig 2011, p. 1027.

Notification to debtors is traditionally deemed as a method of publicity for the disposal of claims, at least by some lawyers in some jurisdictions.[22] It requires that a creditor who will dispose of or has disposed of the claim must notify his debtor of the disposal. Afterwards, third parties can obtain information concerning the disposal from the notified debtor. In some sense, it can be said that notification represents, like possession, a kind of factual control over the claim: when a debtor is notified of the assignment or pledge, he has to pay to the designated assignee or pledgee.[23] However, it might be still problematic to say that the notification is a method of publicity for claims.[24] Can third parties easily know about the disposal after the debtor involved is notified? Can the act of notification be so objective and reliable that the reliance of third parties is protected in the situation where the creditor's authority of disposal is defective? Does the debtor involved have a legal duty to disclose the disposal to third parties who inquire with him? Moreover, the formality of notification might bring a heavy burden for the transaction, in particular when a large number of claims are involved. This casts doubt on the appropriateness of notification as a form of publicity for the transaction of claims.

1.1.3 Question II: Is Registration Desirable?

The questions raised above require us to turn to another question: whether and to what extent the principle of publicity is properly implemented in the law of corporeal movables and claims. To answer this question, we need to conduct comprehensive research into the role played by possession and notification in different types of transactions, examining whether and to what extent the two methods can provide information concerning property rights to third parties who, in turn, can make decisions with safety according to the information. The comprehensive research will be conducted in Chapter 3 and Chapter 4. On the basis of a comparative law study, these two Chapters examine possession and notification to the debtor respectively.

If the research leads to a negative answer, namely that the principle of publicity only exists in a weak sense in the law of corporeal movables and claims, then we need to further explore the desirability and possibility of having a new method of publicity for corporeal movables and claims. This is the central task of Chapter 5. In general, this new method of publicity is (public) registration: whether and how registration should be introduced into the law of corporeal movables and claims to meet the requirement of publicity?

22 DCFR 2009, p. 1076; Proprietary Security in Movable Assets 2014, p. 447; Snijders and Rank-Berenschot 2017, p. 63.

23 Lebon 2010, p. 173.

24 Rongen 2012, p. 498; Von Wilmowsky 1996, p. 392-393.

The formality of registration might have merits as well as disadvantages. Thus, a trade-off seems inevitable in answering this question. In general, scholars' opinions are divided. Some writers approve a system of registration and raise certain criteria for introducing registration for the transaction of corporeal movables and claims.[25] However, other writers take an opposite view and believe that the formality of registration is harmful to the smoothness of transactions; thus, registration should not be allowed to intrude in the law of corporeal movables and claims.[26]

1.1.4 Specific Cases: Secured Transactions, Trusts, and Property Rights of Motor Vehicles

In practice, the fierce debate on the desirability of registration mainly occurs in relation to the secured transaction of movables. In making use of corporeal movables for a security purpose, there is a strong demand that the security provider can continue possessing and using the collateral. This gives rise to a problem of publicity: under the precondition of allowing the debtor to preserve possession, how can a proprietary right of security be shown to third parties over whom it has binding force? In the situation where claims are used as collateral, a problem of publicity also arises. Claims are incorporeal and thereby invisible. How to make proprietary rights of security over claims (such as the right of pledge) transparent is an important matter in the financial practice.

In general, the debate not only concerns whether registration should be employed, but also how and to what extent it should be introduced. Nowadays, neither German law nor Dutch law has any general public system of registration for movables, and the secured transaction of movables remains hidden to third parties.[27] English law has a registration system for the

25 Bridge, Macdonald, Simmonds and Walsh 1999, p. 567-664; Baird and Jackson 1984, p. 299-320.

26 Van den Boezem and Goosmann 2010, p. 751-753; Lwowski 2008, p. 174-179.

27 Brinkmann 2016, p. 340; Heilbron 2011, p. 44. There is a system of registration for aircraft and vessels in German law and Dutch law. In Dutch law, these two special types of corporeal movables fall under the concept of "registerable property (*registergoederen*)" (art. 3:10 BW), and disposal of them requires registration. See Snijders and Rank-Berenschot 2017, p. 44. Slightly different from Dutch law, German law does not require registration for the transfer of "seagoing vessels (*Seeschiffe*)", and even delivery is unnecessary. However, registration is a condition for the mortgage of seagoing vessels. Differently, registered "riverboats (*Binnenschiffe*)" cannot be validly transferred and mortgaged until registration is completed under German law. Pursuant to German law, aircraft can be transferred without registration, and it is general rules concerning the transfer of corporeal movables that are applied to the transfer of aircraft. However, mortgage of aircraft is subject to registration. See Baur and Stürner 2009, p. 406-407; Rakob 2007, p. 89-90; Steppler and Brecke 2015, p. 55.

charge and mortgage of movables.[28] However, the system follows a formal approach, which means that registration is not applied to those transactions that only have a security function in the economic sense, such as reservation of ownership and sale and leaseback.[29] Under the formal approach, only the security interests enumerated by law and having a legal form are registerable. Different from the English law, Article 9 of the Uniform Commercial Code (UCC) takes a functional approach, as opposed to the formal approach, and creates a more comprehensive regime of publicity: all security interests are registerable, irrespective of their legal form.[30] Under Article 9, what matters is the economic function of transactions. As a result, such security devices as reservation of ownership and sale and leaseback are also registerable.

On the EU level, Book IX of the Draft Common Frame of Reference (DCFR), an achievement of academic attempts on the harmonization of security interests in movable assets, takes a middle path. Book IX requires registration for those transactions that only have a function of security in the economic sense (such as reservation of ownership), thereby following a functional approach. However, a formal approach is adopted in some other aspects, such as the enforcement of security interests. For example, the creditor who reserves ownership is entitled to terminate the contract and reclaim the property on the basis of ownership.[31] In the Personal Property Security Act (PPSA) system, accepted by Canada, Australia, and New Zealand, a further step has been taken. Registration is not only required for secured transactions, whether in the economic or legal sense, but also for certain outright transactions that do not serve any function of security.[32] A typical example is that the long lease of movable things with a term of more than one year is subject to the requirement of registration.[33] This is not surprising since the legal relationship of lease serving a security function

28 However, this system is different from the systems of registration for vessels and aircraft. In the case of aircraft, registration is not a condition for transfer, but there is a special register for the mortgage of aircraft. Entry into this special register allows the mortgage to be effective against third parties. Remarkably, the mortgage of aircraft can also be recorded in the register for movables, provided that the mortgagor is a company. As a result, there are two registers for the mortgage of aircraft, and the priority between two mortgages recorded in different registers is determined by the date of registration. See Bridge 2007, p. 152; Bisset 2015, p. 44-45. In the case of vessels, transfer of ownership is effected by "*a bill of sale satisfying the prescribed requirements*" and must be registered, and mortgage takes registration as a condition for the legal effectiveness against third parties. See Bridge 2007, p. 153; Beale, Bridge, Gullifer and Lomnicka 2018, no. 14.34-14.37.

29 Goode 2013, p. 4-5; Bridge, Gullifer, McMeel and Worthington 2013, p. 14.

30 Walsh 2016, p. 76-86.

31 DCFR 2009, p. 4458-4459; De Groot 2012, p. 139-140. The Principles of European Law (PEL) Group takes a similar approach. See Proprietary Security in Movable Assets 2014, p. 243-244.

32 Whittaker and Partner 2015, p. 56.

33 Whittaker and Partner 2015, p. 76.

(such as financial lease) has no substantial difference from the legal relationship of lease having no purpose of providing security (true lease or outright lease). Both give rise to ownership being invisible.

The brief introduction above indicates that two central divergences exist with respect to the issue of publicity of secured transactions of movables. One concerns the desirability of registration, and the other the scope of registration. Though being the most important and controversial, the secured transaction of movables is not the only example related to the matter of publicity for corporeal movables and claims. Another one is the trust.

Trust is a common law concept. The reception of trust in civil law is a traditional and controversial topic. A relevant difficulty is that the trust runs counter to the principle of publicity. Weiser deems this principle as the "*public enemy*" of the reception of trust.[34] In a relationship of trust, the trustee does not have, with respect to the entrusted assets, legal ownership in the civil law sense: the trustee's "ownership" is not full, but subject to the beneficiary's interest which has certain proprietary features. The beneficiary's right can bind certain third parties, especially the trustee's personal creditors (the effect of separation) and *mala fide* subsequent acquirers of the entrusted asset (the effect of tracing). Due to these particular legal consequences, a question of publicity arises: whether registration should be employed, as a supportive regime for the reception, to show third parties the relationship of trust and the proprietary limitations caused over the right of ownership.

As to the issue of reception, the French *fiducie* introduced in 2007 provides an example.[35] However, it seems that the 2007 legal reform gave insufficient attention to the problem of publicity. The trust of immovable property is required to be registered and thus is visible to third parties.[36] However, the registration for the trust of movables is mainly for the purpose of administrative regulations and is not publicly available to third parties, thereby failing to be a private registration. This is deemed as "*a weakness of the French legal framework*".[37] The Convention on the Law Applicable to Trusts and on Their Recognition (1984) requires registration under article 12.[38] However, this requirement is thought of as "*surprising*" by some common law experts.[39] In their opinion, the fact that the trust is hidden is a merit rather than a problem: thanks to this feature, transferees do not

34 Weiser 1936, p. 8.
35 Mallet-Bricout 2013, p. 143.
36 Fix 2014, p. 211.
37 Barrière 2013, p. 123.
38 Article 12 Convention on the Law Applicable to Trusts and on Their Recognition (1984): "*Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.*"
39 Lupoi 2000, p. 173.

have to worry about whether the property involved is under a trust, which smooths the progress of transactions.[40]

From this brief introduction, it can be seen that there is a deep divide between common law and civil law in the aspect of publicity of the trust. In this research, we pay particular attention to the issue of the publicity of trust, but only to the extent that the entrusted asset is corporeal movables and/or claims.

Registration of secured transactions and trusts are two examples related to the content of transactions; another example, however, concerns the object of transactions: registration of motor vehicles.[41] Though motor vehicles have become a common product in our daily life and an important type of collateral in secured transactions, many jurisdictions lack a system of public registration. As a result, property rights of motor vehicles still use possession as a method of publicity. The question is, however, whether possession is sufficient for showing proprietary interests of motor vehicles to third parties.

In the aspect of value, longevity and the possibility of identification, motor vehicles bear significant similarities to vessels and aircraft. Nevertheless, they are treated differently. For example, motor vehicles under Dutch law are not "registerable property (*registergoederen*)", a kind of property taking public registration as the method of publicity and includes immovable property, certain vessels, and aircraft.[42] The proprietary interest of motor vehicles also lacks registration under English law, German law, and Dutch law, which causes a problem of information to third parties. As a market response, two registers, the Hire Purchase Inspection (HPI) and the AutoCheck, have been implemented by several large finance companies in England.[43] In Australia, secured transactions of motor vehicles have been noted by legislators. In constructing a system of registration for movables,

40 Lupoi 2000, p. 173; Lau 2011, p. 154-155.

41 Roughly speaking, motor vehicle is self-propelled with an engine and commonly wheeled. Unlike trains and trams, it does not operate on rails. It is used for the transportation of people or cargo. It includes cars, buses, motorcycles, off-road vehicles, and trucks. The term motor vehicle is not a legal concept in private law, and motor vehicles are regulated under the concept of corporeal movable. However, motor vehicle is a term technically defined by traffic law. In general, traffic law stipulates the requirements concerning the number of wheels, the type of engine (internal combustion engine and/or electronic engine), the speed, the cylinder capacity, the weight and so on. See s. 185 Road Traffic Act (1988) of Great Britain, art. 1 *Wegenverkeerswet* (1994) of the Netherlands, and § 1 *Straßenverkehrsgesetz* (1909) of Germany. In this research, an accurate definition is not provided for motor vehicles, which, nevertheless, does not prevent us from discussing the publicity of motor vehicles. In general, if a motor vehicle has to be registered for the purpose of public regulation according to traffic law, then this motor vehicle falls within the scope of our discussion. This is because, as will be shown later, a system of public registration should be introduced on the basis of the current administrative system of registration (see 5.6).

42 Reehuis and Heisterkamp 2019, p. 7.

43 Beale, Bridge, Gullifer and Lomnicka 2018, no. 9.26-9.33.

the Australian PPSA describes motor vehicles as a typical category of "*serial-numbered property*", and the registration of security interests of motor vehicles requires an indication of the serial number, namely the Vehicle Identification Number (VIN).[44] On account of the existing divergences, this research will explore the question of whether public registration should be introduced for motor vehicles.

In summary, this research focuses on two central questions:
(1) is the principle of publicity still tenable on the basis of existing means of publicity (possession and notification to the debtor) in the law of corporeal movables and claims and to what extent?
(2) should registration be employed to meet the requirement of publicity for property rights created on corporeal movables and claims?

Moreover, we also conduct three case studies in this research because of their relevance to the issue of publicity: the secured transaction in corporeal movables and claims, the trust of corporeal movables and claims, and registration of motor vehicles.

1.2 Research Methodology

The central methodology of this research is a comparative law study mainly involving legislation, cases and scholarly commentaries. As a research method, comparative law studies serve certain purposes, among which the principal one is to facilitate the development of law on a national level and the harmonization of law on a regional or international level.[45] This purpose is supposed to be a reason why this research is conducted.

In general, English law, German law and Dutch law are taken as the main body of the comparative study here. The reason for choosing these three jurisdictions involves several aspects. The first aspect concerns comprehensiveness. The aim of this research is to provide a general discussion of the principle of publicity in the law of corporeal movables and claims. This requires the jurisdictions selected to be diverse and typical. In the field of private law, especially property law, common law and civil law differ significantly. Among the three jurisdictions, English law represents common law, and the other two jurisdictions belong to the family of civil law. For example, the concept of possession in English law is apparently different from the concept of "possession (*Besitz*)" in German law as well as from the concept of "possession (*bezit*)" in Dutch law (see 3.1). Moreover, the legal effect of notification to the debtor in English law is different from that in German law and Dutch law (see 4.1).

44 Whittaker and Partner 2015, p. 178-179.
45 Wilson 2007, p. 87-88.

There is a distinction within the family of civil law between the Germanic law group and the French law group, which are represented by the German Civil Code (*Bürgerliches Gesetzbuch*, abbreviated as BGB) and the French Civil Code (*Code Civil*, abbreviated as CC) respectively.[46] This distinction is, more or less, a result of the fact that some jurisdictions are more affected by the BGB, while others by the CC.[47] Historically, Dutch private law was heavily influenced by French law.[48] For this reason, it belongs to the French law group. Yet, the later recodification in the second half of 20th century has made the new Dutch Civil Code (*Burgerlijk Wetboek*, abbreviated as BW) more similar to German law.[49] However, in some aspects closely related to this research, Dutch law still differs from German law. One example is that the concept of *bezit* in Dutch law differs from the concept of *Besitz* in German law: the two are different in the aspect of the possessory intention (see 3.1). This has been mentioned above. Moreover, how the legal effect of notification to debtors over the disposal of claims is prescribed by German law and Dutch law differently (see 4.1). Notification has nothing to do with the assignment of claims under German law, but it is a requirement for the "disclosed assignment (*openbare cessie*)" under Dutch law.[50] In the end, the new BW is quite modern, which implies that recent developments of private law can be reflected by it or, at least, discussed during the process of the recodification. For example, E.M. Meijers, the spiritual father of the new BW, proposed to construct a system of registration for the undisclosed pledge, but his proposal met with fierce resistance and was not accepted in the end.[51]

In this research, the comparative study is not confined to the three jurisdictions in some parts, especially the case study on publicity of secured transactions in corporeal movables and claims. In that part, Article 9 UCC and the PPSA systems in Canada, Australia and New Zealand are also discussed. Article 9 UCC and the PPSA systems are quite different from the current system operating in the three jurisdictions selected. As has been indicated above, both German law and Dutch law do not have any system of public registration for the secured transaction, and English law only has a system under the formal approach, which means that the scope of registration does not include such security devices as reservation of ownership and sale and leaseback. The UCC first introduced a comprehensive system of registration, namely the notice-filing system, under the functional approach.

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46 Zweigert and Kötz 1998, p. 132.

47 The two groups differ in, for example, how to define the concept of possession, whether ownership can be transferred upon the conclusion of the contract, and whether a defect of the underlying contract can affect the transfer of ownership. See Ritaine 2012, p. 52, 98-100; McGuire 2012, p. 42, 73-77.

48 Hondius 1982, p. 351.

49 Tallon 1993, p. 197. Drobnig pointed out, from an outsider's perspective, that in terms of the requirements for a valid transfer the new BW is "*on the half of the way between Paris and Berlin* (*auf halbem Wege zwischen Paris und Berlin*)". See Drobnig 1993, p. 181.

50 Kötz 2010, p. 1296; Snijders and Rank-Berenschot 2017, p. 302.

51 Hamwijk 2014, p. 62.

As a result, registration is applicable to every proprietary security interest, regardless of the legal form it takes. Inspired by but somewhat different from the UCC, the PPSA systems also construct a notice-filing system and extend registration to some non-security transactions of movables, such as the long lease of movable things.[52] In another case study, registration of trust, the recent development in French law and Belgian law is included.

The comparative law study also has another dimension: at the end of this research, we examine the new Chinese Civil Code (2020) and provide some proposals for the construction of a system of registration for corporeal movables and claims. Here, the author should mention that despite his expertise in Chinese law, he did not choose Chinese law as a subject matter of the comparative study. This is because most of its legal concepts and rules can find their origin from other jurisdictions, in particular German law and Japanese law.[53] In addition, another reason is that the current rules of Chinese law concerning the research topic are not sufficiently concise, which would create some difficulties for the comparative study if Chinese law had been selected. For example, the concept of possession is not defined by Chinese law, despite the fact that most Chinese lawyers refer to German law (namely the rules of *Besitz*) in understanding this concept.

Before comparing the jurisdictions selected, it is necessary to find and then clarify relevant sources of law. The sources of law mainly include statutes and precedents. In general, case law is more important in English law than in both German law and Dutch law. This, however, does not mean that statutes are irrelevant for understanding English law. It will be found that the Sales of Goods Act (1979), the Law of Property Act (1925), the Bills of Exchange Act (1882) and the Companies Act (2006) are of great importance for transactions involving corporeal movables and claims. In the course of understanding English statutes, it should be borne in mind that case law, especially precedents based on equity, might change the content of statutory rules. As a result, the whole image of English law is co-shaped by statutes and precedents. German law and Dutch law are quite different from English law in this aspect. The former two jurisdictions have codified most rules of private law into codes (such as the BGB and the BW). It is codes that serve as the principal source of law in Germany and the Netherlands. However, merely paying attention to the codes is insufficient. Case law is also relevant, at least, in two aspects: one is that the court might create a new rule or regime, such as the security transfer of ownership in German law;[54] the other is that judicial cases might further develop statutory rules.

In understanding the sources of law mentioned above, a doctrinal approach is adopted. The central function of the doctrinal approach is to

52 Whittaker and Partner 2015, p. 56.

53 For Chinese legislation in the field of private law, Japanese law always has significant importance, perhaps due to geographic reasons. At present, a large number of Chinese scholars are engaging in the comparative study between Chinese law and Japanese law.

54 Brinkmann 2016, p. 341.

"*identify, analyse and synthesise the content of the law*".[55] Moreover, to clarify how the present regime of publicity for corporeal movables and claims operates in each of the selected jurisdictions, we also focus on academic commentaries and sometimes legislative materials. For example, this research often refers to the DCFR, an achievement of academic attempts for the harmonization of European private law, and related commentaries, in particular the commentaries concerning Book VIII ("Acquisition and Loss of Ownership of Goods") and Book IX ("Proprietary Security Rights in Movable Assets").

From the introduction above on research methodology, it is not difficult to see that this research as a whole has a doctrinal characteristic.[56] Empirical research, a non-doctrinal approach which can be either quantitative or qualitative, plays a limited role in this dissertation. Briefly stated, quantitative research "*deals with numbers, statistics or hard data*".[57] It is not involved in this dissertation. The qualitative method is different from the quantitative method in that the former is non-numerical and "*mostly in the form of words*".[58] The qualitative empirical method also should be carefully distinguished from the doctrinal research, because the former is used to explore "*social relations and reality as experience*" rather than to reveal the content of applicable laws.[59] Here, we make use of some non-numerical data or facts related to the theme of this research, such as in the analysis of the information demanded by different types of third parties. However, these data or facts are mainly obtained through analysis of the literature.

1.3 Research Outline

In addition to this Introduction Chapter, the dissertation includes six other Chapters, including the summary Chapter.

1.3.1 Chapter 2: Property Rights, Third Parties, Information, and Publicity

Chapter 2 seeks to lay a theoretical foundation and to construct a framework for the whole research. It addresses two questions: (1) what is the essence of property rights and what are their distinctive features compared to other types of rights, especially the personal right (see 2.1); and (2) what is the

55 Hutchinson 2013, p. 9.

56 To avoid misunderstandings, saying that the whole research is doctrinal does not mean that we only compare legal concepts or rules in doing comparative law studies. In the contemporary study of comparative law, the fundamental method should be the functional approach, an approach that focuses on the effect and legal consequences of law, as has been asserted by Zweigert and Kötz. See Zweigert and Kötz 1998, p. 34.

57 Chui 2007, p. 48.

58 Chui 2007, p. 48.

59 Dobinson and Johns 2007, p. 21.

connection between the third-party effect of property rights with "proprietary information", a term raised by this research, and publicity (see 2.2).

In Chapter 2, we first discuss the traditional debate on whether property rights are a subject-object relationship or a subject-subject relationship. There, property rights are argued as a legal relationship between persons. After that, we explore the most important feature of property rights, namely absoluteness. Property rights can bind third parties. In dealing with this feature, we categorize third parties into three types: strange interferers, subsequent acquirers, and general creditors. Strange interferers, such as the illegal dispossessor, are third parties who bear a duty to not interfere. Violation of this duty will trigger certain legal consequences, such as the return of the thing and pecuniary compensation. Subsequent acquirers are third parties who enjoy a property right but bear a duty to respect the already existing property rights on the same thing.[60] General creditors are third parties who, in the event of the debtor's insolvency, have an unsecured claim and fall into a position inferior to secured creditors.

After that, we explain how the feature of absoluteness gives rise to a problem of information asymmetry to third parties. The existence of this problem makes it desirable to have a proper means of publicity to reliably communicate proprietary information, i.e. information concerning property rights. As is pointed out, the content of proprietary information demanded varies from one type of third party to another. It is obvious that subsequent acquirers demand much more intensive proprietary information than strange interferers. For example, knowing the specific identity of the owner of a bicycle is unnecessary for strange interferers, but essential for a person who wants to purchase this bicycle.

1.3.2 Chapter 3: Corporeal Movables and Possession

Chapter 3 focuses on possession, which is traditionally deemed as a means of publicity for corporeal movables. In that chapter, a conceptual analysis of possession is provided first by comparing the three jurisdictions, namely English law, German law, and Dutch law (see 3.1). In general, possession is a "functional" concept: how to define it is mainly contingent on legislative policies. This explains why significant differences exist in the way of defining the concept between the three jurisdictions. After the conceptual comparison, we then turn to the issue whether and to what extent possession can serve as a means of publicity for corporeal movables (see 3.2). There, we find that possession is a defective means of publicity because it cannot clearly show third parties proprietary interests of corporeal movables. Possession can only indicate that the possessor has a *right* to the possessed

60 For example, where A wants to obtain ownership of a bicycle that has already been pledged to B, then A is a subsequent acquirer, a third party, in relation to B. Here A has to respect B's right of pledge.

object. It does not indicate the content and type of this right. In this sense, possession is an ambiguous method of publicity.

After the general discussion, we examine the importance of possession for different types of third parties, namely strange interferers (see 3.3), subsequent acquirers (see 3.4), and general creditors (see 3.5). It will be further argued that the information conveyed by possession, namely that the possessor enjoys a right to the possessed thing, is sufficient for strange interferers. Possession can function as a system of navigation for human beings to avoid conducting illegal interference. However, the information is insufficient for subsequent acquirers and general creditors. Where only possession is used as a means of publicity for corporeal movables, property rights remain hidden to these two types of third parties. As a result, the problem of information asymmetry is still existent in the transaction of corporeal movables. In this sense, we can say that the principle of publicity based on possession has significantly faded in the law of corporeal movables.

1.3.3 Chapter 4: Claims, Notification to Debtors, and Documental Recordation

In Chapter 4 attention shifts to notification to debtors and documental recordation, the means of publicity for claims and "documental rights" respectively. Documental rights are documental because they are embodied within documents or securities. In essence, documental rights are a kind of claim (personal right). This Chapter includes two parts: one focuses on notification to debtors (see 4.1), and the other deals with securities concerning goods and payments (see 4.2). As pointed out above, claims have a proprietary aspect once they are included in the transaction: the disposal of claims also involves a problem of information. For example, in the situation of assignments of claims, the potential assignee needs to identify whether the assignor has qualified authority to dispose. In this Chapter, we examine whether and to what degree the two methods can communicate proprietary information to the three types of third parties: strange interferers, subsequent acquirers, and general creditors.

The conclusion on the notification to debtors is negative: just notifying the debtor involved cannot make the disposal of a claim visible to third parties. After notifying the debtor, third parties can, at most, be provided with a possibility to know of the disposal through inquiry with the debtor. However, the debtor has no legal duty to provide information, nor will the information provided be assumed to be correct for the benefit of the inquirer. Moreover, where a large number of claims are involved, notifying all the debtors will be very costly. This casts doubt on the appropriateness of the notification as a means of publicity for claims. In the end, the requirement of notification creates an obstacle to the disposal of future claims, claims that have not come into existence yet, because the identity of the debtor of future claims cannot be ascertained.

In contrast, securities qualify for being a means of publicity for rights embodied in the security: they are often treated as an outward appearance of rights.[61] From securities, third parties can know about disposals of the embodied right because law requires the transacting parties to provide a simple record on the face of the securities. For example, where a bill of exchange to order is pledged, a mark of pledge might be made on the face of the bill of exchange; as a result, third parties can know of the pledge after glancing at the bill of exchange.[62] To avoid misunderstandings, it is necessary to mention here that securities to goods (such as warehouse receipts) only embody a personal claim for recovery of the goods, rather than ownership or any proprietary limited right to the goods. On account of this, recordation on the securities to goods is discussed in the same Chapter as the notification to the debtor, even though the transfer of securities to goods is closely linked to the disposal of the goods involved.

1.3.4 Chapter 5: The Rationale of Publicity in the Law of Corporeal Movables and Claims

Chapter 5 offers a conclusive analysis on the basis of the preceding two Chapters. It seeks to reveal the rationale of publicity as a special formality in transactions and to disclose its importance for different types of third parties (see 5.1). After that, we explore the role publicity plays in the course of the derivative acquisition of property rights. In general, the system of derivative acquisitions can be divided according to two criteria: one leads to the distinction between the declaratory system and the translative system, and the other gives to the causation principle and the abstraction principle.[63] Here, the difference between the two systems lies in whether the valid acquisition of property rights requires the formality of publicity as a condition.[64] The two principles differ in whether a defect in the underlying contract can affect the acquisition *per se*. The connection of publicity with the two systems and the two principles are discussed in 5.1.

After concluding, on the basis of Chapter 3 and Chapter 4, that the principle of publicity has faded in the law of corporeal movables and claims (see 5.2), we address another central question of this research: whether and how registration should be employed to meet the requirement of publicity. The question is discussed in two stages. The first stage is to propose the essential aspects that need to be considered for employing registration for corporeal movables and claims (see 5.3). This stage involves a general discussion. In the second stage, we analyze three specific cases, namely the

61 Hueck and Canaris 1986, p. 82; Schnauder 1991, p. 1648; Scheltema 1993, p. 96-99.
62 Zevenbergen 1951, p. 70.
63 Snijders and Rank-Berenschot 2017, p. 276-278.
64 Krimphove 2006, p. 59.

secured transaction (see 5.4), the trust (see 5.5), and the transaction of motor vehicles (see 5.6).

1.3.5 Chapter 6: Implications for Chinese Law

Chapter 6 examines the new Chinese Civil Code (2020) and provides some observations for the construction of a system of registration for corporeal movables and claims. The observations mainly concern how to improve the current Chinese system of registration for corporeal movables and claims in the context of the new civil code. In general, the old system under the Property Law (2007) is not comprehensive or efficient. The system only applies to the mortgage (charge) of corporeal movables and pledge of receivables (monetary claims). Thus, a number of property rights concerning these two types of property remain hidden to third parties. For example, reservation of ownership and sale and leaseback are excluded from the system. Moreover, the ways in which the present system operates are costly, which hampers the smoothness of transactions. For example, the system is regionally fragmented and not fully automated, which creates inconvenience to the legal practice.

The drafters of the new Chinese Civil Code (CCC) have been aware of the problems presented above. Under the new civil code, reservation of ownership, financial lease and factoring are subject to registration for the legal effectiveness against third parties. However, the extension of the scope of registration is insufficient, since sale and leaseback, true lease, and non-factoring assignment remain outside the register. In addition, the CCC leaves space for the State Coucil to construct a unified system of registration in the future by not specifying the registry intentionally. The fragmented systems will be unified as one comprehensive system. In this research, several proposals are raised for the construction of a future register in China.

1.3.6 Chapter 7: Summary

The last Chapter provides a summary of this research. In sum, this research focuses on the rationale of publicity in the law of corporeal movables and claims and includes a comparative study mainly involving English law, German law, and Dutch law. After providing a general introduction to property rights and publicity, we examine the qualification of possession, notification to debtors and securities as a method of publicity. The result of this examination is that the principle of publicity is only implemented in a very weak sense by these methods. Therefore, a system of (public) registration should be introduced into the law of corporeal movables and claims, making proprietary rights over these two types of property transparent. The current Chinese system of registration for corporeal movables and claims are defective in many aspects and needs to be improved.