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STABILITY AND CHANGE IN PROPERTY LAW: A COMPARATIVE APPROACH TO THE PRINCIPLE OF *NUMERUS CLAUSUS*

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DECLARATION

I, Ling Ernesto René Vargas Weil confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

ABSTRACT

As a result of following a 'principle of *numerus clausus*', contemporary property systems are frequently described as static, rigid and formalistic. Under this principle, the number and content of property rights are limited by the law. This creates two sources of rigidity: first, it denies private parties the freedom to create new property forms by contract, and second, it restricts the power of courts to develop the property system. Despite this, modern property systems seem largely capable of accommodating the demands created by a vast array of external changes without undergoing noticeable transformations. This dissertation aims to contribute to the solution of this paradox through a comparative research of English and German property law.

Contrary to recent views arguing for the relaxation of the *numerus clausus* principle and the expansion of the list of property rights to keep property law in step with society, this thesis puts forward that the *numerus clausus* provides property law with an 'internal' structure that can accommodate new realities without the need of constant reform. The core of this argument is that the restrictions that the *numerus clausus* imposes on the free creation of property rights ensure that property law retains a modular structure that preserves the liberty of third parties to 'functionally transform' the object of their property rights in the face of changing circumstances.

To develop this argument, the dissertation relies on the distinction between trespassory and successor liability recently advanced in Anglo-American scholarship. By noticing that the *numerus clausus* has different effects in limiting the creation of duties that will affect all strangers and duties that will only affect successors in title to the thing, this dissertation brings to light the doctrinal and functional structures that allow contemporary German and English property law to accommodate real-world changes with limited legislative reforms.

IMPACT STATEMENT

Inside academia, this thesis can have an impact in comparative law and property law theory. To start, it validates the use of comparative research to approach questions of property law theory. This is important as, until recently, comparative law was seen as not capable of producing relevant outcomes in this field, due to the highly divergent nature of national property systems. For example, distinguishing between trespassory and successor liability can serve to tackle an array of questions that have remained unexplored due to the lack of a conceptual apparatus to bridge the civil-common law divide. From a substantive perspective, this dissertation constitutes a direct answer to recent calls for a 'conceptual-comparative' approach to property law, as it brings new angles to approaching the nature of rights sitting on the border of the law of property and the law of obligations, including equitable property rights and civilian leases.

From the perspective of property law theory, the findings of this dissertation can have an immediate effect on the ongoing debate on the normative justification of the principle of *numerus clausus.* After a period of growing interest triggered by scholars approaching it in the style of the American law & economics movement, the *numerus clausus* has come increasingly under attack. The findings of this dissertation can have immediate impact on this debate, as they provide a new normative framework to support the principle, based on its conceptual underpinning in English and German property doctrine and its application in actual case law.

Finally, this thesis can also have a substantive impact outside academia. As shown in this dissertation, courts are under permanent pressure to relax legal doctrines that seem to introduce rigidity into the law and frustrate the legitimate goals of private parties. By showing the effects that the *numerus clausus* has on preserving the sound dynamic operation of property law, the findings of this thesis provide compelling arguments for judges to avoid the temptation of breaching the *numerus clausus* to achieve immediate outcomes that will be off-set in the long-run. By the same token, it provides arguments for judges to defer substantial reforms in this field to legislators.

In close connection to the latter, this thesis can also have a direct impact on policy making and legal reform. Its central argument suggests that attempts of reform providing for new property rights should be approached with care. At the present, this is especially relevant for a number common law jurisdictions that have recently introduced, or are considering introducing, new property rights running with land. Although this thesis does not offer a plan for legislative reform it provides an insight into elements that can make such reforms successful. One of them is that legislation that reproduces the modular structure of the relevant property system tends to work better. Probably the best example of this is the contrast between the success of the German flat ownership right and the relative irrelevance of the English commonhold.

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ABBREVIATIONS

ALR	*Allgemeines Landrecht für die Preußischen Staaten*, General State Laws for the Prussian States (Prussia, 1794)
BAG	*Bundesarbeitsgericht*, Federal Court for Labour Law (Germany)
BayObLG	*Bayerisches Oberstes Landesgericht,* Higher Regional Court of Bavaria (Germany)
BGB	*Bürgerliches Gesetzbuch,* Civil Code (Germany, 1900)
BGH	*Bundesgerichtshof*, Federal Court of Justice (Germany)
BVerfG	*Bundesverfassungsgericht*, Federal Constitutional Court (Germany)
BVerfGG	*Bundesverfassungsgerichtsgesetz*, Constitutional Court Act (Germany, 1951; reenacted, 1993)
CPR	Civil Procedure Rules (England & Wales, 1999)
GG	*Grundgesetz für die Bundesrepublik Deutschland,* Basic Law for the Federal Republic of Germany (1949)
EI	*Erster Entwurf zum BGB*, First Draft of the BGB (1888, Germany)
ErbbauRG	*Erbbaurechtsgesetz*, Superficies Right Act (Germany, 2007)
ErbbauVO	*Erbbaurechtsverordnung*, Superficies Right Regulation (Germany, 1919)
HRA 1998	Human Rights Act 1998 (UK)
LPA 1925	Law of Property Act 1925 (England & Wales)
LP(MP)A 1989	Law of Property (Miscellaneous Provisions) Act 1989 (England & Wales)
LRA 1925	Land Registration Act 1925 (England & Wales)
LRA 2002	Land Registration Act 2002 (England & Wales)
IA 1986	Insolvency Act 1986 (UK)
InsO	*Insolvenzordnung*, Insolvency Regulation (Germany, 1999)

Motive	*Motive zu dem Entwürfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich (1888)*, Explanatory notes to the First Draft of the BGB (Germany, 1888)[1]
OLG München	*Oberlandesgericht München*, High Court of Munich (Germany)
RG	*Reichsgerricht*, Imperial Court (Germany)
KG Berlin	*Kammergericht*, Chamber Court of Berlin (Germany)
TierVerbG	*Gesetz zur Verbesserung der Rechtsstellung des Tieres im bürgerlichen Recht,* Act for the improvement of the position of animals in private law (Germany, 1990)
TOLATA 1996	Trusts of Land and Appointment of Trustees Act 1996 (England & Wales)
WEG	*Wohnungseigentumsgesetz (Gesetz über das Wohnungseigentum und das Dauerwohnrecht)*, Flat Ownership Act (Germany, 1951; 2007)
WRV	*Weimarer Reichsverfassung*, Weimar Constitution (Germany, 1919)
ZPO	*Zivilprozessordnung*, Civil Procedure Regulation (Germany, 1879; reenacted, 2005)

[1] Available https://archive.org/details/motivezudementw01germgoog/page/n5/mode/2up

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Part I

Research Question and Methodology

CHAPTER 1

LEGAL CHANGE IN PROPERTY LAW

1.1. The paradox of property law

In a frequently quoted passage, the American judge Benjamin Cardozo stated that the '*existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters us for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth'.*[1] Common wisdom assumes that this requires the law to be flexible and in constant reform.[2] However, there is one area at the core of most modern legal systems that does not appear to live up to this maxim: across jurisdictions, contemporary property law is frequently described as static, rigid, formalistic and, above everything else, obsessed with certainty.[3] Despite this, modern property systems seem to be largely capable of accommodating the demands created by a vast array of social, economic and technological changes, without undergoing noticeable transformations. How is this paradox possible? One conceivable answer is that there is no real paradox: either the description of property law as static and rigid is false or, conversely, it is accurate, and property law is failing to keep in step with social change. Another option is to embrace the paradox and defeat common wisdom by explaining how contemporary property systems *can* deal with changing social needs, while retaining their stability. This dissertation is an attempt to contribute to the solution of this paradox through the second path. Relying on comparative research of English and German law, it argues that modern property systems have an 'internal' or 'doctrinal' structure that allows them to accommodate new realities without the need of constant reform, thanks to the protection they provide to party autonomy.

[1] Benjamin N Cardozo, *The Growth of the Law* (Yale UP 1924) 19–20.
[2] E.g. see, Raymond Wacks, *Law: A Very Short Introduction* (2nd edn, OUP 2015) 118.
[3] See Chapter 1, section 2 (hereinafter 1.2).

This is a relevant matter. In all known places and times, resources have been scarce in relation to human needs, making disputes regarding their allocation a source of potentially extreme and violent disagreement.[4] The primary function of any property system is solving such allocation problems in a peaceful and predictable manner.[5] Experience has shown once and again that social, economic and technological developments always bring new questions regarding the allocation of resources. [6] If property law hopes to succeed in fulfilling its most basic function, it must have a way, a 'principle of growth', to address these changes. Therefore, understanding how a field of law so frequently described as static and rigid interacts with a changing world is of paramount importance, not only for legal scholarship, but also for other social sciences and policy making.

This dissertation shows that, from a doctrinal perspective, the static and rigid aura of property law stems from two sources. First, property law seems to be highly resilient to pressures for legislative change. In England, the basic structure of land law (the LPA 1925) will soon be one hundred years old, while its terminology and structure evoke the feudal language of a far more distant past. In Germany, the core of property law (Book 3 of the BGB) has remained essentially untouched since 1900 and its conceptual roots can easily be traced to the preexisting system of Roman law.[7] Second, as a result of following a principle of *numerus clausus* of property rights, modern property systems also seem to leave very limited room for their adaptation through judicial creativity and party autonomy. In England, the LPA 1925 provides for a closed list of legal estates and interests and limits the permissible equitable interests to those existing before the coming into force of the Act.[8] In a similar fashion, in Germany, the *Motive* explicitly holds that new types of property rights can only be created by legislation.[9]

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[4] For three classic quotes illustrating this see William Blackstone, *Commentaries on the Laws of England*, vol 2 (11th edn, printed by A Strahan and W Woodfall 1791) 2; Pierre-Joseph Proudhon, *What Is Property?: An Inquiry Into The Principle Of Right And Of Government* (University of Virginia Library; NetLibrary 1996) 38; Karl Marx and Friedrich Engels, *The Communist Manifesto* (OUP 1992) 18.
[5] Jeremy Waldron, *The Right to Private Property* (OUP 1988) 31-32.
[6] Alexander Peukert, *Güterzuordnung Als Rechtsprinzip* (Mohr Siebeck 2008) 1-2.
[7] See 3.3.
[8] ss 1 and 4(1) LPA 1925.
[9] 1–3.

However, legal history suggests that the appearance of a stable and immutable law is misleading: the law is in constant flux, although the rate of change varies from time to time and epochs of stagnation alternate with periods of rapid evolution.[10] Thus, contemporary property regimes are probably less static and rigid than they appear at first sight, although their evolution might be harder to perceive than in other areas of private law. For example, Alan Watson argued that English land law survived over centuries with minor modification thanks to the use of a variety of 'legal scaffoldings' that hid the divergence between legal rules and social needs at the cost of adding complexity to the operation of the system.[11] Similarly, in the context of continental property law, Karl Renner maintained that the ownership rules of modern civil codes, originally developed to encompass the household as a unity of production and consumption, went through a radical 'functional transformation' (i.e., a transformation in how they were *used* by private parties), as part of the development of modern capitalist societies, while the black letter rules contained in codes remained unchanged.[12]

Accounting for this process in contemporary property law is an open question. In general, the 'patterns of legal change' are inadequately understood by legal scholarship and, as consequence, little studied and undertheorized.[13] In this vein, the existing accounts of the evolutionary patterns of contemporary property law seem especially incomplete. Scholarship tends to focus on very specific developments (e.g., transitional processes),[14] extinct legal systems (*e.g.*, legal history)[15] or systematizing the law as it is at the present (*e.g.*, doctrinal accounts).[16] Other legal disciplines that

[10] RC van Caenegem, *An Historical Introduction to Private Law* (CUP 1992) 181–182.
[11] Alan Watson, *Society and Legal Change* (Temple UP 2001) 47–58, 87–97, 122, 131–132.
[12] Karl Renner, *The Institutions of Private Law and Their Social Functions* (Agnes Schwarzschild tr, Routledge and Kegan Paul 1976).
[13] Paul Mitchell, 'Patterns of Legal Change' (2012) 65 CLP 177, 177.
[14] E.g., Amnon Lehavi, 'Land Law in the Age of Globalization and Land Grabbing' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 295–297.
[15] For example, see John Baker, *Introduction to English Legal History* (5th edn, OUP 2019) 241–337; Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung* (3rd edn, Vandenhoeck & Ruprecht 2016); van Caenegem (n 10).
[16] See Martin Dixon, 'A Doctrinal Approach to Property Law Scholarship: Who Cares and Why?' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave 2016) 6.

could offer useful analytical tools to account for legal change in this field, including comparative law, sociology of law and law & economics, have traditionally not been very interested in property law.[17] In contrast, starting with the work of Harold Demsetz,[18] the evolution of property rights has attracted a great deal of attention in New Institutional Economics (NIE). However, due to their very nature, these approaches have not been specially concerned with the concrete doctrinal forms that property rights adopt in practice. Hence, the paradox of legal change in property law remains unanswered.

Over the last years, a growing number of studies have highlighted the need of providing more attention to the impact that the passage of time has in property law.[19] As a consequence, the interface of property law with external change has been thematized in a variety of contexts that, however, remain fragmented and isolated. This dissertation puts forward that the ability of Comparative Law to bring different legal disciplines together and shed light on the '*living problems that lurk behind [the] technical facades [of the law]*'[20] can provide a novel framework to analyse this material and advance in finding a solution for the paradox of property law. Nonetheless, an overarching view of the patterns of legal change in property law exceeds the possibilities of any PhD thesis, while omitting reference to concrete examples would defeat the purpose of this one.

This dissertation develops a theoretical framework to answer a narrow question from a broad perspective: how do English and German property law, two property systems made of a limited number of standardized and static property types, accommodate social, economic and technological changes? In doing so, this thesis focuses on land law and on a principle that is central to the reputed rigidity of property law: the *numerus clausus* principle. This focus allows for an ambitious approach that attempts to

[17] See 1.2.
[18] Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 Am Econ Rev 347.
[19] See Sarah Blandy, Susan Bright and Sarah Nield, 'The Dynamics of Enduring Property Relationships in Land' (2018) 81 MLR 85, 88; Sjef van Erp, 'Comparative Property Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1050–1053, 1056; Peukert (n 6) 1–7.
[20] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 4.

combine a rich contextual account of the English and the German version of the *numerus clausus* principle of property rights, with an interdisciplinary understanding of its interactions with changing realities. The primary finding will be that property law systems subject to a *numerus clausus* principle are capable of accommodating social and economic change without undergoing structural transformation and that the principle itself plays a key role in this, as the substantive way in which it standardizes property rights can protect private autonomy.

I start by formally placing the paradox of property law in the context of the existing scholarship (rest of Chapter 1) and accounting for the methodology I plan to use (Chapter 2). In Part II, I develop the doctrinal and theoretical framework of the thesis by comparing the English and German concepts of a property right (Chapter 3), accounting for the doctrine of *numerus clausus* in both jurisdictions (Chapter 4), analysing its impact on the sources of legal change (Chapter 5) and discussing its function and justification (Chapter 6). In Part III, I apply this framework to concrete cases, differentiating between the effects that the *numerus clausus* has on the generic ability of property rights to bind 'strangers' (Chapter 7) and its narrower capability of biding successors in title (Chapter 8). Finally, I present my main conclusions (Chapter 9).

1.2. The static aura of property law

Change in private law is a topic on the rise. For example, the Obligations VIII conference held in 2016 had 'Revolution and Evolution in Private Law' as its central topic. Summarizing the papers presented, Sarah Worthington suggested that legal change in private law has three essential components: creative lawyers that push the boundaries of the law with new arguments, judges sympathetic to such claims who are willing to develop inventive responses to them, and imaginative scholars who can depict these developments in newly conceived frameworks.[21] On one view, property

[21] Sarah Worthington, 'Revolution and Evolution in Private Law' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart 2018) 4.

law seems to lack all these elements: according to recent comparative research, across jurisdictions, property law is immersed in a mentality of 'technocratic conservatism' that tends to preserve the *status quo* and accepts changes only when they become unavoidable.[22]

In England, this image seems nowhere more apparent than in land law. In the whole history of English law, few reforms (if any) have been so often proposed and failed as proposals to simplify the transfer of land. Despite having been seen as a defective system by the commissioners of the 1829-33 period, significant reforms in this field where only achieved by the end of 19th century and were not consolidated until the LRA 1925.[23] Similar cases can also be found in contemporary England. In the early 2000s the Law Commission described the law of escheat as 'indefensible' and needing 'fundamental reform', expressing its desire to review feudal land law. However, in 2011 the reform of feudal law was left out the program of the Law Commission, under the argument that greater public benefit would result from other projects.[24] Closer to this dissertation, the many proposals of the Law Commission to introduce positive covenants -the last in 2011[25]- have not led to legislative reform.

Courts do not seem more eager to innovate. For example, in *Prudential Assurance Co Ltd v London Residuary Body*, one of the leading cases on the English law of leases, the House of Lords refused to change the rule requiring leases to be subject to a certain term from the outset, despite holding it to be an '*ancient and technical'* rule that produces a '*bizarre outcome*' and has no '*satisfactory rationale*' nor '*useful purpose*', as any judicial change '*might upset long established titles*'.[26] When courts have departed from the rigid doctrines of property law to satisfy practical outcomes, scholars

[22] van Erp (n 19) 1037.
[23] See AH Manchester, *A Modern Legal History of England and Wales, 1750-1950* (Butterworth 1980) 303, 306, 310, 326. On change in English land law, also see Watson, *Society and Legal Change* (n 11) 47–60.
[24] Ian Williams, 'The Certainty of Term Requirement in Leases: Nothing Lasts Forever' (2015) 74 CLJ 592, 606–607, especially at fn 86.
[25] Law Commission, 'Law Com No 327. Making Land Work: Easements, Covenants and Profits à Prendre' (2011). On this proposal, Elizabeth Cooke, *Land Law* (2nd edn, OUP 2012) 236–242.
[26] [1992] 3 WLR 279, 287.

have also criticised them.[27] Even when Parliament has created new property forms to deal with new social problems, practising lawyers frequently prefer to stick to the property right they already know, as revealed by the negligible practical relevance of the commonhold introduced in 2002.[28] This situation is in strong contrast with the English law of obligations: in modern times, contract law is said to have experienced the rise, fall and revival of freedom of contracts,[29] and some of its fundamental dogmas have been wiped-out by case law[30] and legislation.[31] Tort law[32] and unjust enrichment[33] have also experienced similar paradigm shifts.

Despite having a different structure, German private law reveals a surprisingly similar image. Descriptions of property law as static, rigid or conservative are ubiquitous in mainstream doctrine,[34] especially when compared to the law of obligations.[35] According to one of these accounts, the core structure of property law is a closed system based on a set of principles that have remained unchanged since the entering into force of the BGB in 1900.[36] Enactment of new property rules is rare and the interpretation of the existing ones is highly conservative, as the central questions of property law have been mostly settled for many years. Accordingly, the scope of the topics covered by judicial decisions of higher tribunals is narrow, there is little space

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[27] E.g., William Swadling, 'Opening the Numerus Clausus' (2000) 116 LQR 354; Kelvin FK Low, 'Certainty of Terms and Leases: Curiouser and Curiouser' (2012) 75 MLR 401.
[28] See Lu Xu, 'Commonhold Developments in Practice' in Warren Barr (ed), *Modern Studies in Property Law*, vol 8 (Hart 2015) 332, 334–335; 'Law Com No 394. "Reinvigorating Commonhold: The Alternative to Leasehold Ownership"' (2020).
[29] See PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 2003) 571–680.
[30] See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, on promissory estoppel.
[31] See Contracts (Rights of Third Parties) Act 1999, on privity of contracts.
[32] See *Donoghue v. Stevenson* [1932] AC 562 and *Robinson v CC West Yorkshire Police* [2018] UKSC 4, on duty of care.
[33] See *Lipkin Gorman v Karpnale Ltd.* [1991] 2 AC 548, on mistaken payment of money.
[34] For example, Christian Grüneber, 'Einleitung', *Palandt. Bürgerlicher Gesetzbuch mit Nebengesetzten* (80th edn, Beck 2021) 4; Heinrich Honsell, 'Einleitung Zum BGB' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 19; Reinhard Gaier, 'Einleitung Zum Sachenrecht' in Franz Jürgen Säcker and others (eds), *Münchner Kommentar zum BGB* (7th edn, Beck 2017) [24]; Friedrich Quack, *Münchener Kommentar Zum Bürgerlichen Gesetzbuch. Sachenrecht*, vol 6 (Friedrich Quack ed, 3rd edn, Beck 1997) 17.
[35] For example, Jan Wilhelm, *Sachenrecht* (5th edn, De Gruyter 2016) 5; Manfred Wolf, 'Beständigkeit Und Wandel Im Sachenrecht' [1987] NJW 2647, 2647.
[36] Hans Hermann Seiler, 'Einleitung Zum Sachenrecht' in Elmar Bund and others (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Sellier & de Gruyter 2007) 38.

for new solutions and questions presented by case law and scholars change rarely and slowly.[37] Indeed, German property law has even been mocked as 'millimetre law'.[38] German scholars seem also frequently hostile to reforms.[39] For example, a leading *Kommentar* to the BGB attributes the infrequent changes in property law to the high quality of the BGB, openly criticizing subsequent legislation that departs from its basic principles for not measuring up to such quality.[40] It is tempting to attribute this static image to the codified nature of German private law, but this would be a mistake. Parts of the BGB dealing with family and succession law have been subject to heavy transformations since the 1950s,[41] while the 2002 Act for the Modernization of the Law of Obligations[42] brought into the code several matters covered by special statutes, as well as some paradigm-shifting doctrines developed *praeter legem* by courts over the previous 100 years.[43]

The aura of property law as a petrified part of modern legal systems seems to result from three linked but different approaches. At a purely descriptive level, the static nature of property law has been attributed to some feature inherent to it. In the realm of sociology of law, Alan Watson has pointed to the historically great effort involved in the reform of a property system and the lack of incentive for legislative bodies to incur the political costs of engaging in such reforms.[44] Relying on economic analysis, Yun-chien Chang and Henry Smith have formalized the same idea arguing that the inertia of property law can be explained by its network effects and path dependence.[45] They argue that property rights are part of a communication network that, because of its shared understanding, makes communication easier. This network is subject to heavy

[37] Quack (n 34) 17–18.
[38] Rolf Stürner, 'Dienstbarkeit Heute' (1994) 194 AcP 265, 265.
[39] Seiler (n 36) 38.
[40] Quack (n 34) 18.
[41] Karl Larenz and Manfred Wolf, *Allgemeiner Teil Des Bürgerlichen Rechts* (9th edn, Beck 2004) 39–41.
[42] Gesetz zur Modernisierung des Schuldrechtrechts vom 26. November 2001 (BGBl. I 2001 S. 3138).
[43] For example, the enactment of the doctrine of the fall of the basis of the transaction in § 313 BGB. See Larenz and Wolf (n 41) 42; Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (OUP 2005) 1–4, 30–34.
[44] Watson, *Society and Legal Change* (n 11) 115, 118, 131, 132.
[45] Yun-chien Chang and Henry Smith, 'An Economic Analysis of Civil versus Common Law Property' (2012) 88 Notre Dame L Rev 1; Yun-chien Chang and Henry E Smith, 'Structure and Style in Comparative Property Law' in Theodore Eisenberg and Giovanni B Ramello (eds), *Comparative Law and Economics* (Edward Elgar 2016).

inertia for two reasons. First, property rights are subject to path dependence due to the high fixed costs involved in setting up the system. Second, property systems are subject to 'network effects', meaning that they become more valuable the more people use it (like the internet or phones), which implies that they become harder to change the more they expand. They apply this model to account for the persistent divergence in the way that property rights are delineated in the common law and the civilian traditions: once a particular style of property rights was established in each by organized actors capable of overcoming collective action problems and interested in paying the initial fixed costs, and the use of such system grew over time, the style of such delineation became increasingly harder to change. In the common law such style comes from the introduction of the feudal system after the Norman conquest, while in the civil law it comes from the Roman law received and systematized by the 19th century civil codes of France and Germany.

The second approach is essentially normative. It holds that the strong historic commitment of property law to achieve legal certainty has led it to become a rather petrified legal field.[46] As shown in Chapter 3, across jurisdictions, the most characteristic doctrinal feature of property rights is their ability to impose duties or liabilities on third parties. Because property rights affect people that have not agreed to be bound by them, it is frequently held that such rights need to be subject to a high level of certainty and predictability.[47] This view is reinforced by policy arguments that stress that property rights must be stable in order to provide owners with expectations that allow them to plan, invest and develop information about the relevant asset.[48] Thus, to a large extent, property law is not only perceived as static, but also as an area of law that *ought to be* static in order to achieve social peace and economic efficiency. To achieve these ends, civilian and common law scholars alike assume that property law must be highly rigid, technical, detailed and largely mandatory in character, leaving

[46] E.g., van Erp (n 19) 1032.
[47] See J Michael Milo, 'Property and Real Rights' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 726; van Erp (n 19) 1032; Henry E Smith, 'Economics of Property Law' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 2: Private Law and Commercial Law* (OUP 2017) 170.
[48] Smith, 'Economics of Property Law' (n 47) 150. In this same line, AM Honoré, 'Rights of Exclusion and Immunities Against Divesting' (1959) 34 Tul L Rev 453, 468; Dixon (n 16) 7.

little space for private autonomy.[49] As a result, in both England[50] and Germany[51] scholars highlight that the 'boring' nature of property should be seen as a compliment, as it reflects its capability to solve extremely relevant social disputes in a dispassionate form.

A third approach, which will be at the core of this dissertation, focuses on the legal doctrines property law is said to rely upon to provide third parties with predictability and clarity regarding the property interests that might affect them. From this perspective, across jurisdictions, the most recurrent explanation for the rigid and static nature of property law is that modern legal systems are subject to a *numerus clausus* principle of property rights.[52] Under this principle, as discussed extensively in Chapter 4, the number and content of property rights are limited by the law and only rights that conform to such pre-existing list are enforced as property rights by courts. In this way, the principle of *numerus clausus* creates two in-built sources of rigidity in modern property systems: first, it denies private parties the freedom to create new property forms by contract; and, second, it restricts the power of courts to develop the property system.[53] This creates a self-evident pressure on the legal system: for Christian von Bar, the lower number of property rights, the more the need for reforms;[54] while for Hanoch Dagan, the lower the number of available options, the lesser autonomy parties enjoy.[55] As examined in Chapter 5, by limiting courts to enforcing an existing list of

[49] See van Erp (n 19) 1032; Milo (n 47) 726. For a different view, see Hanoch Dagan, *A Liberal Theory of Property Law* (CUP 2021).
[50] E.g., Ben McFarlane, *The Structure of Property Law* (Hart 2008) 4.
[51] E.g., Quack (n 34) 18.
[52] This link has been suggested countless times over the last decades in a variety of forms and context. From a comparative perspective, Milo (n 47) 726; van Erp (n 19) 1042–1044; Bram Akkermans, 'The Numerus Clausus of Property Rights' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 100–101, 115–117; Michael Weir, 'Pushing the Envelope of Proprietary Interests: The Nadir of the Numerus Clausus Principle?' (2015) 39 MULR 651. In property theory, Dagan (n 49) 9, 110–111. In English law, Worthington (n 21) 5; Chris Bevan, 'The Doctrine of Benefit and Burden: Reforming the Law of Covenants and the Numerus Clausus "Problem"' (2018) 77 CLJ 72, 90. In German law, Larenz and Wolf (n 41) 252–253; Wilhelm (n 35) 10–11; Peukert (n 6) 7–13.
[53] Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale LJ 1, 58; McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 8) 309; Akkermans (n 52) 102.
[54] Christian von Bar, 'The Numerus Clausus of Property Rights: A European Principle?' in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart 2014) 454.
[55] See Dagan (n 49) Chapter 4.

recognized property interests, at least formally, the principle places the whole authority to adapt property law to new realities within the competence of legislators,[56] who for various reasons, have not always been regarded as specially interested in developing private law.[57] Hence, in a variety of contexts, scholars have argued in favour of making the principle more flexible, for example, by adopting a '*numerus quasi-clausus*',[58] having an '*ex post numerus clausus*',[59] providing for a residual category that allows parties to create new property rights,[60] or even, getting rid of the restrictions to the free delineation of property rights altogether.[61] This dissertation argues against these views.

1.3. Dynamism in property law

The previous account of property law as static and rigid only tells half of the story. As acknowledged in a variety of contexts, property law is always interacting with changing social and economic circumstances,[62] with practising and academic lawyers putting constant pressure on the conceptual categories of property law.[63] For example, taking a comparative perspective Sjef van Erp recently argued that a number of circumstances, spanning from climate change to market integration, make a change

[56] Merrill and Smith (n 53) 58.
[57] Alan Watson, 'From Legal Transplants to Legal Formants' (1995) 43 Am J Comp L469, 469; Watson, *Society and Legal Change* (n 11) 115–118, 133.
[58] Sjef van Erp, 'A Numerus Quasi-Clausus of Property Rights as a Constitutive Element of a Future European Property Law' (2003) 7 EJCL.
[59] Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia 2008).
[60] Dagan (n 49) 110–112; Hanoch Dagan and Irit Samet, 'Express Trust: The Dark Horse of the Liberal Property Regime', *Philosophical Foundations of the Law of Trusts (Simone Degeling et al eds., Forthcoming 2022)* 19–20 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3753282> accessed 28 January 2022.
[61] Richard A Epstein, 'Why Restrain Alienation?' (1985) 85 Colum L Rev 970; Richard A Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' (1981) 55 S Cal L Rev 1353.
[62] For modern examples, although prior to the 1950s, see William Cornish and others, *Law and Society in England 1750-1950* (2nd edn, Hart 2019) 168–193 (for England); Werner Schubert, 'Die Diskussion Über Eine Reform Des Rechts Der Mobiliarsicherheiten in Der Späten Kaiserzeit Und in Der Weimarer Zeit' (1990) 107 ZRG Germ Abt 132 (for Germany). For a current example regarding the use of servitudes to create 'conservation easements' in Germany and England, see Inga Racinska and Siim Vahtrus, 'The Use of Conservation Easements in the European Union' (NABU Bundesverband 2018) 60, 99.
[63] JE Penner, *The Idea of Property in Law* (OUP 1997) 35.

of mentality in this field not only imminent, but also unavoidable;[64] while Bram Akkermans has openly called for reforms, especially at the EU level.[65] It is tempting to see these developments as part of socio-political events that are alien to the core of the well-established domestic property systems of the West, typically transitional processes (e.g., ex-Soviet states, China, South Africa, etc.),[66] or as confined to narrow problems that do not shake the edifice of domestic property law, like the recognition of property rights in a limited number of new objects (e.g., human body parts, pecuniary claims, public law licences, etc.)[67] or EU law. However, this is only the tip of the iceberg.

As shown in this dissertation, even a superficial approach to English and German domestic property law reveals constant activity to keep property law in step with society. Despite being described as '*without doubt the greatest single monument of legal wisdom, industry and ingenuity which a statute book can display*',[68] the scheme established by the 1922-1925 English land law legislation has experienced a number of relevant reforms impacting areas such as the family home,[69] formalities,[70] trusts of land[71] and registration,[72] while, in a number of cases, English courts have taken flexible and innovative approaches to achieve doctrinal outcomes that better fit social realties.[73] German property law has also been impacted by a variety of legal reforms, most of them taking place outside Book 3 of the BGB. These include legislation providing for new types of property rights in land[74] and excluding animals from being objects of property (see § 90a BGB).[75] Modern case law has also reshaped the property concepts of the BGB 'from outside'. Civil courts have developed new legal

[64] van Erp (n 58) 1037.
[65] Akkermans (n 52) 116.
[66] See Lehavi (n 14) 295–297.
[67] See Sabrina Praduroux, 'Objects of Property: Old and New' in editor Michele Graziadei and editor Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 57–67.
[68] Manchester (n 23) 324–325, quoting R.E. Megarry and H.WR. Wade The Law of Real Property (4th ed) at p. 1157.
[69] Matrimonial Homes Act 1967.
[70] LP(MP)A 1989.
[71] TOLATA 1996.
[72] LRA 2002.
[73] E.g., the development of the common intention constructive trust since the 1970s, see Cooke (n 25) 87–96. Closer to this research, the development of the recreational easement discussed in 4.3 and 8.2.
[74] See ErbbauVO, ErbbauRG and WEG.
[75] Introduced by the TierVerbG.

interests that strongly resemble property rights,[76] while the BVerfG re-interpreted the BGB concept of ownership in light of the social duties the GG imposes on property rights (*Sozialpflichtigkeit des Eigentums*),[77] facilitating new environmental, artistic and animal protection legislation.[78]

This overview leaves us with a conflicting image. One the one hand, property law is recurringly described as rigid and static; but, on the other, there is also plenty of evidence of constant developments in this field. Solving the paradox of legal change in property law requires placing both strands in a single conceptual framework that can account for stability and change in property law at once. As shown in the next subsection, for different reasons, the existing models dealing with the evolutionary patterns of property law are not able to do this.

1.4. Evolution in property law

The previous subsection suggests that property law has relevant dynamic dimensions that are not sufficiently understood by legal scholarship. To some extent this can be explained by the impact of the rigid aura of property law: in contrast to the law of obligations, which is perceived as a dynamic area of private law, across jurisdictions, property law is frequently regarded as far less exiting.[79] However, different disciplines also have other reasons for having neglected this problem. Doctrinal analysis is primarily devoted to providing a systematic understanding of the law as it is in a given place and time,[80] making it inherently committed to explain property law from a static perspective. By contrast, legal history tends to focus on historical legal systems and its structural change over much longer time spans;[81] and when historical arguments

[76] Especially, *Sicherheitstum* and the *Antwartschaftsrecht*, discussed in 4.2 and 8.3.
[77] Especially with the 1981 'Wet Gravel Case' (*Nassauskiesungsbeschluss*), BverfGE 58, 300. In general, see Seiler (n 36) 49–50. For details, 3.2.
[78] Quack (n 34) 3, 19.
[79] See van Erp (n 19) 1033. See too n 50 and n 51 above.
[80] See Dixon (n 16) 6.
[81] For example, see Baker (n 15) 241–337; Wieacker (n 15); van Caenegem (n 10). Also see footnote 15. However, there are also efforts of legal historians to explain the general patterns of legal change, e.g., Mitchell (n 13).

are made in actual legal disputes, they are frequently used to justify property law as it currently is,[82] not to explain its patterns of change.[83] In turn, sociology of law has been mostly interested in the opposite direction of influence: how the law can change society, assuming as obvious that legal change reflects wider social developments.[84] Despite its analytical value, the few attempts to account for the impact of social and economic change in property law from a systematic perspective seem outdated: Watson's interpretation ends with the English land law reform of 1925 and explicitly excludes the continental codifications and other contemporary efforts to rationalize the law; [85] while Renner's book,[86] originally written in 1904 and updated in 1929, has a classic Marxist framework that leads him to concentrate on how property rights were used in the development of a capitalist economy during the 19th century.

A notable effect of the scarce interest of legal scholarship in property law is that law & economics and comparative law, arguably the 20th century's two most relevant attempts to understand the law,[87] have mainly focused on tort and contract law and, until recently, remained relatively uninterested in property law.[88] This has deprived this field of some key insights on the dynamic nature of contemporary legal systems, including the theories of efficient evolution of the common law,[89] legal transplants[90] and legal formants.[91] However, there are deeper reasons explaining the

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[82] Alfred L Brophy, 'Doing Things with Legal History: Historical Analysis in Property Law' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (OUP 2018) 924, 925–932, 940-941. Although, historic arguments are occasionally used to achieve change, e.g. see *Berrisford v Mexfield Housing Co-operative Ltd* [2012] 1 AC 955, [2011] UKSC 52.
[83] See Mitchell (n 13) 177-178.
[84] Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd edn, OUP 1992) 45, 49. A notable exception to this, although not dealing with private law is Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (2nd edn, Transaction Publishers 2001), mentioned in 5.4 and 6.4.
[85] See Watson, *Society and Legal Change* (n 11) 48, 55, 136. The last edition of William Cornish does not leave us much further, as it ends in the 1950, see Cornish and others (n 62).
[86] Renner (n 12).
[87] See Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 Int Rev Law & Econ 3, 18.
[88] For Comparative Law, van Erp (n 19) 1032–1033, 1036–1037; for Law & Economics, Smith, 'Economics of Property Law' (n 47) 149, 153.
[89] See Paul H Rubin (ed), *The Evolution of Efficient Common Law* (Edward Elgar 2007); Richard A Posner, *Economic Analysis of Law* (7th edn, Aspen 2007) 249–273.
[90] See Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd ed., University of Georgia Press 1993).
[91] See Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 Am J Comp L 1; Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law

underdeveloped status of property law in both fields. In Comparative Law this is frequently explained by the difficulty in reconciling the highly national and technical rules of domestic property systems,[92] this is, by a methodological limitation. The relative lack of interest of law & economics in property law has been attributed to conventional price theory and standard economics assuming property rights as fixed in their analysis of tort and contract law.[93] In other words, different to Comparative Law, in this case, the lack of interest results from an inherent bias towards seeing property rights as static.

Considering the relevance that economic analysis has in the contemporary approach to the *numerus clausus*,[94] it is relevant to account for the latter in more detail. The most common explanation for the tendency of law & economics to see property rights as static is that Ronald Coase's foundational work for the movement[95] has been normally interpreted as disregarding the importance of the allocation and delineation of property rights or as assuming them as fixed and well defined entitlements that are a precondition of his model.[96] This has been argued to be the result of the powerful but also simplified way in which Coase's conclusions are normally presented: as a theorem with corollaries.[97] The 'Coase Theorem' was first framed by George Stigler[98] and, since then, it has been presented in different forms.[99] However, its central idea is always the same: in a world with zero transaction costs, people will always reach a wealth-maximizing result through contracting, *regardless of the legal assignment of property rights*.[100] Accordingly, the standard approach of law & economics sees the foundation of property rights in a theory of bargain,[101] which is more concerned with

(Installment II of II)' (1991) 39 Am J Comp L 343; Watson, 'From Legal Transplants to Legal Formants' (n 57).
92 van Erp (n 19) 1032, 1033; Milo (n 47) 726, 727.
93 Thomas W Merrill, 'Introduction: The Demsetz Thesis and the Evolution of Property Rights' (2002) 31 JLS 331, 331.
94 See 4.3 and 6.2.
95 Ronald Coase, 'The Problem of Social Cost' (1960) 3 JLE 1.
96 Brian Lee and Henry Smith, 'The Nature of Coasean Property' (2012) 59 Intl Rev of Economics 145, 147–149.
97 Thomas W Merrill and Henry E Smith, 'Making Coasean Property More Coasean' (2011) 54 JLE 77, 93–95.
98 George J Stigler, *The Theory of Price* (3rd ed, Macmillan NY; Collier-Macmillan 1966) 113.
99 Robert Cooter and Thomas Ulen, *Law & Economics* (6th edn, Pearson 2012) 81.
100 See Merrill and Smith (n 97) 93; Lee and Smith (n 96) 148; Cooter and Ulen (n 99) 85.
101 E.g., Cooter and Ulen (n 99) 74.

contractual problems than with property law.[102] In this account, the role of property law in 'the real world' is reduced to: (i) 'lubricating' bargaining by establishing simple, clear and certain property interests; and (ii) initially allocating the property interests to whoever values them the most, in order to avoid unnecessary transactions.[103] As a result, the primary concern of traditional economic analysis of law regarding property rights is their clarity and stability, not their evolution and change, as (efficient) re-adjustment of property rights are essentially seen as a matter of re-allocation by consent, neglecting or criticising legal doctrines that, like the *numerus clausus*, limit the right of private parties to re-allocate assets.[104]

By contrast, since its origin in the 1970s,[105] NIE has been very interested in property rights and their evolution.[106] The point of departure of this process was the work of Demsetz,[107] who picked up the problem laid down by Coase but, instead of looking to contracts, focused on the role of property rights in dealing with externalities.[108] In a path breaking article he argued that '*property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization'*.[109] The idea behind his thesis is that the primary function of property rights is 'internalizing' (*i.e.*, allocating) benefits and harms in a world of positive transaction costs. Hence, the evolution of property rights can be explained by the emergence of new beneficial and harmful effects (*i.e.*, 'externalities'), resulting from changes, ultimately triggered by events such as technological changes or the opening of new markets. He explains this through the process by which the native inhabitants of the Labrador Peninsula moved from an open access to a private property system in land after they started to hunt for commercial purpose after the arrival of the French.[110] However, despite its persuasiveness, Demestz's model does not say much about a few matters that are critical to understand the evolution of property law in practice, including (i) the process

[102] See ibid 85, 88–90.
[103] ibid 92–93.
[104] See 6.2.
[105] John N Drobak, 'Introduction: Law & The New Institutional Economics' in John N Drobak (ed), *Norms and the Law*, vol 26 2.
[106] Smith, 'Economics of Property Law' (n 47) 159.
[107] Merrill (n 93) 331; Smith, 'Economics of Property Law' (n 47) 159.
[108] Merrill and Smith (n 97) 78.
[109] Demsetz (n 18) 350.
[110] ibid 350–353.

by which a society moves from one property system to another,[111] (ii) the concrete form that the emergent property rights might take,[112] and (iii), most importantly for this dissertation, the manner in which private property systems already in operation accommodate social and economic changes.

This discussion primarily focuses on explaining the transit from one property system to another, normally from open access to private property and, to a lesser extent, from private property back to more communal systems.[113] However, probably as a result of the little attention paid to the different doctrinal forms that property rights have in the real world,[114] law & economics and NIE offer virtually no account on the evolution of legal interests *within* private property systems: that is, how new proprietary interests emerge in already existing private property systems or how the available interests are re-shaped to satisfy new needs over time, or evolve gradually into others with different boundaries and internal structures. Filling this gap requires moving from the existing abstract approaches of the evolution of property rights to concrete research on how real-world property interests are used to serve new purposes and are re-shaped over time. A relevant advance in this direction has recently been made in the US by Henry Smith's 'modular theory',[115] but more research on the concrete operation of actual property rights is needed see how this theory works in practice. This research needs to emphasise not only what outcomes property law achieves, but *how* it achieves such outcomes,[116] in other words, it needs to move from functional to conceptual aspects of legal institutions.[117] The next subsection argues that comparative law offers the best gateway to do this.

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111 Merrill (n 93) 333, 336.
112 ibid 333-335, 336.
113 Saul Levmore, 'Two Stories about the Evolution of Property Rights' (2002) 31 JLS 421, 422; Henry E Smith, 'Introduction' in Kenneth Ayotte and Henry E Smith (eds), *Research Handbook on the Economics of Property Law* (Edward Elgar 2012) 1, 3.
114 See next subsection.
115 See Henry E Smith, 'Property as the Law of Things' (2012) 125 Harv L Rev 1691; Smith, 'Economics of Property Law' (n 47).
116 Borrowing from Ben McFarlane, 'The Trust and Its Civilian Analogues', *The Worlds of the Trust* (CUP 2013) 512.
117 Borrowing from Merrill and Smith (n 97) 78, 100.

1.5. Why Comparative Law?

The previous subsection concluded that understanding the evolutionary patterns of contemporary property law requires paying more attention to the way in which the doctrinal structure of actual legal systems interact with changing realities *in practice*. Over the last years, a number of relevant advances in this regard have been made in a variety of contexts, including domestic property doctrine, Anglo-American property theory and Comparative Property Law. However, for different reasons, none of these approaches provides an encompassing view of the patterns of legal change in property law.

In both England[118] and Germany[119] doctrinal scholarship has made some enlightening research linking property doctrine to changing social circumstances. However, its findings are very context-specific and are not placed into a larger conceptual framework that allows us to account for their general patterns. By contrast, Anglo-American property theory has developed a strong conceptual framework, but with insufficient engagement with actual doctrine and tangible practical events.[120] The starting point of this theory is a strong intuition from everyday life: '*well-advised citizens can, at some cost, almost always obtain results denied to them by one legal device using another*'.[121] Following this lead and as part of their thesis about the 'optimal standardization of property rights' discussed in Chapter 6.2, Thomas Merrill and Henry Smith argued that, although the *numerus clausus* principle might frustrate some objectives of the parties, often those objectives can be realized by a more complex combination of the standardized building blocks of property law thanks to the

[118] E.g., Blandy, Bright and Nield (n 19); Low (n 27); Susan Pascoe, 'Re-Evaluating Recreational Easements- New Norms for the Twenty-First Century?' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law*, vol 10 (Hart 2019); Bevan (n 52).
[119] E.g, Hermann Amann, 'Grunddienstbarkeiten Im Wandel Der Zeit Und von Verjährung Bedroht – Zugleich Anmerkungen Zu Den Urteilen Des BGH v. 18. 7. 2014 - V ZR 151/13 Und v. 22. 10. 2010 - V ZR 43/10' [2015] DNotz 164; Peukert (n 6); Wolf (n 35).
[120] Smith has argued that property theory suffers a kind of reductionism that confines it to the 'stratosphere of abstraction'. Henry E Smith, 'Emergent Property' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 320.
[121] Bernard Rudden, 'Economic Theory v. Property Law: The Numerus Clausus Problem' in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence. Third Series* (Clarendon 1987) 239.

'*generative power of the system*'.[122] Henry Smith later refined this idea arguing that property rights have a 'modular structure' that allows private parties to combine them in many different forms to achieve an almost infinite variety of practical purposes.[123] According to him, property law organizes the world by packaging legal relations around useful attributes that tend to be strong complements. The property system defines these things by using a rough and general 'exclusion strategy' and then complementing them with fine grained 'governance strategies' that regulate more sophisticated relations, typically involving neighbours.[124] In this model, flexibility is brought into property law within the constraints of the *numerus clausus* by allowing private parties to contract at the interface of these modules and giving them limited 'delegated powers' to modify them. Courts can also innovate but are not supposed to create new property forms. Major changes to property law require a 're-modularization' of the system, which is typically channelled through legislation.[125]

Smith's modular theory provides a simple and powerful model to explain how a property system made of a limited number of rigid interests can accommodate new realities without undergoing apparent change. However, because this model is framed in the highly abstract style of American law & economics,[126] it also has a limited ability to explain how property law interface with changing realities in practice. On the one hand, its dependence on concepts that are not directly related to real-world legal categories ('modularity', 'interface') nor practical experience, leaves relevant aspects of the actual operation of property rights in the shadow; on the other, when the modularity thesis relies on concrete legal forms, it has a clear focus on American law, disallowing any direct transfer of its conclusions into other legal systems and traditions. Research on the actual building blocks available in different legal systems could close this gap by enhancing our understanding of the doctrinal features that give real-world property systems their 'generative power'.[127]

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[122] Merrill and Smith (n 53), quote at p. 36.
[123] Smith, 'Property as the Law of Things' (n 115) 1692, 1701, 1707, 1708.
[124] ibid 1693, 1694, 1709. Also developed in Smith, 'Economics of Property Law' (n 47) 150.
[125] Smith, 'Property as the Law of Things' (n 115) 1724. For example, see 8.3 on the legislative introduction of flat-ownership in Germany.
[126] Although Smith would probably place his work as part of 'New Private Law'. See 6.1.
[127] Using an expression from Merrill and Smith (n 53) 36.

Due to the importance that comparative research gives to the 'law in action',[128] comparative property law is in an excellent position to provide this input. The timing could not be better. Over the last years, the European harmonization and unification efforts have triggered a vivid interest in the dynamic aspects of property law among comparative scholars.[129] This discussion has placed vast parts of the domestic property laws of Europe in a comparative perspective[130] and it has been especially concerned with the *numerus clausus* principle.[131] In this context, authors have frequently argued in favour of a more flexible version of the principle,[132] thereby implying that the *numerus clausus* constitutes a hurdle for the development of property law. However, this literature lacks a refined explanation of how legal change works in property law other than pointing to the legislative monopoly created by the *numerus clausus*.[133] Instead, it relies on a handful of actual cases in which courts have breached the *numerus clausus* to solve practical problems as proof that the principle needs to become more flexible.[134]

However, the advantages of Comparative Law to assess the modularity of modern property rights go far beyond providing the 'raw material' to test an abstract model. First, legal systems other than the American have not been subject to the same pervasive influence of law & economics,[135] and can therefore enlighten the analysis with features that might pass unnoticed in the policy-oriented arguments that dominate the American legal landscape. Other common law jurisdictions, such as England, have

[128] See Zweigert and Kötz (n 20) 11, 38; Florian Wagner-von Papp, 'Comparative Law & Economics and the Egg-Laying Wool-Milk Sow' (2014) 9 J Comp L 137, 155; Florian Faust, 'Comparative Law and Economic Analysis of Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 837–838.
[129] van Erp (n 19) 1034.
[130] Especially, Akkermans (n 59).
[131] E.g., van Erp (n 58); Peter Sparkes, 'Certainty of Property: Numerus Clausus or the Rule with No Name?' (2012) 20 Euro Rev Priv L 769; Bar (n 54).
[132] For a summary, Akkermans (n 52) 115–116.
[133] It simply refers back to the Anglo-American discussion. E.g., van Erp (n 58) at IV; Akkermans (n 52) 114.
[134] See Chapter 4.
[135] Richard A Posner, 'The Future of the Law and Economics Movement in Europe' (1997) 17 Int Rev Law & Econ 3, 5; Kristoffel Grechenig and Martin Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism' (2008) 1 Hastings Int'l & Comp L Rev 295, 298; Wagner-von Papp (n 128) 141–144.

not experienced the systematization efforts that took place in the US during the twentieth century (*e.g.*, the drafting of the Restatements of the Law or the Uniform Commercial Code) spending most of their resources reconciling hundreds of year of case law by means of an 'historic exegesis'; while civilian countries, especially Germany, tend to focus on the 'doctrinal exegesis' of codified law, normally being reluctant to depart from Kantian-inspired moral philosophy in favour of adopting the utilitarian approach that underlies law & economics.[136] Thus, as apparent in my discussion on the function and justification of the *numerus clausus* (Chapter 6), paying attention to different national legal systems does not only bring real-world institutional variation to the analysis, but also adds a variety of perspectives, including the 'historic rationality' of the English common law and the 'systematic rationality' of the German civil law.[137] Second, comparative law not only provided a counterweight to economic-oriented legal analysis but also allows a conceptual cross-fertilization between the civilian and common law traditions. This can help national doctrine to better understand their own version of the *numerus clausus*, as has previously happened with the trust.[138] In particular, English doctrine can benefit from German conceptualism, while German doctrine can learn from the casuistic approach of English law. Finally, the emphasis (good) comparative law puts on understanding the function of legal institutions within the context of the wider social fabric of society[139] has led this discipline to develop ties with 'neighbouring disciplines', including legal

[136] Wagner-von Papp (n 128) 141.
[137] See Otto Kahn-Freund, 'Introduction' in Karl Renner, *The Institutions of Private Law and their Social Functions* (Routledge & Kegan Paul Limited 1949) 12–14.
[138] See Lionel D Smith, 'Trust and Patrimony' (2008) 38 Rev Gen Dr 379; Paul Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property' in Lionel Smith (ed), *The Worlds of the Trust* (CUP 2013).
[139] Zweigert and Kötz (n 20) 11, 38; Mary Ann Glendon, Paolo Carozza and Colin Picker, *Comparative Legal Traditions: Text, Materials and Cases on Western Law* (3rd edn, West Academic Press 2006) 16; Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 369; Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart 2014) 5.

history,[140] law & society[141] and, more recently, law & economics[142] that can provide 'interdisciplinary links' to incorporate dynamic elements from other legal and extra-legal disciplines into the analysis of property law.

To summarize: this chapter has shown that, so far, scholarship has not offered an encompassing view able to account for stability and change in property law at once. However, different legal and extra-legal disciplines have made relevant progress in specific aspects relevant for this topic. The challenge is finding a method that brings all this material into a common framework and fills the gaps in it. That will be the topic of the next chapter.

[140] Zweigert and Kötz (n 20) 8–10; Mathias Reimann, 'Comparative Law and Neighbouring Disciplines' in Mauro Bussani (ed), *The Cambridge Companion to Comparative Law* (CUP 2012) 22–23; James Gordley, 'Comparative Law and Legal History' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 767–769.
[141] Zweigert and Kötz (n 20) 10–12; Reimann (n 142) 25–27; Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 710–711.
[142] See Faust (n 128); Raffaele Caterina, 'Comparative Law and Economics' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012). I have expanded on this elsewhere, see Ernesto Vargas Weil, 'Map and Territory in Comparative Law & Economics' (2022) 11 Global J Comp L 1.

CHAPTER 2

RESEARCH METHOD AND APPROACH

2.1. The comparative method and its problems

Chapter 1 concluded by arguing that Comparative Law has the capability of bringing a variety of elements from different disciplines and jurisdictions into one single and coherent approach. This might be true, but resorting to comparative research, especially in the context of property law, is not that easy. Comparative Law suffers from a chronic methodological weakness,[1] that has led its only (more or less) developed approach, the 'functional method', to be at the heart of almost any debate in this field.[2] Property law only seems to increase this problem. As explained in Chapter 3.1, the pronounced doctrinal differences between national property laws make this field one of the most challenging[3] and least explored[4] topics in Comparative Law. This chapter accounts for these pitfalls and outlines the approach I will use to overcome them.

The central credo of the functional method is that legal institutions which fulfil the same function are usefully comparable.[5] This method rests on the basic assumptions that *'the legal system of every society faces essentially the same problems, and solves*

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[1] Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 Am J Comp L 671, 685, 686, 688, 689; Ralf Michaels, 'Im Westen nichts Neues? 100 Jahre Pariser Kongreß für Rechtsvergleichung – Gedanken anläßlich einer Jubiläumskonferenz in New Orleans' (2002) 66 Rabels Z 97, 111, 114.

[2] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 346.

[3] Ugo Mattei, *Basic Principles of Property Law. A Comparative Legal and Economic Introduction* (Greenwood 2000) 21.

[4] J Michael Milo, 'Property and Real Rights' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 727; Sjef van Erp, 'Comparative Property Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1032.

[5] See Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 34; Uwe Kischel, *Comparative Law* (Andrew Hammel tr, OUP 2019) 88–89; Michaels, 'The Functional Method of Comparative Law' (n 2) 347–348; Mathias Siems, *Comparative Law* (2nd edn, CUP 2018) 31–33.

these problems by quite different means though very often with similar results'.[6] According to this approach, the starting point of any comparative inquiry must be a research question posed in purely functional terms, without reference to a specific legal system.[7] The rest of the method is presented by different authors in diverse manners, but its substance reflects the same blueprint.[8] According to it,[9] after laying down the research question, the researcher must choose the legal systems to be compared. Next, she must present the results of each system, accounting for them in their own terms, in a manner accessible to those not familiar with it. At this stage, the researcher should explain why each system has reached a certain solution, looking anywhere in the realm of social science. The following step is building a system with its own syntax and vocabulary, capable of embracing the quite heterogenous legal institutions which are functionally comparable. The final stage will depend on the purpose of the research, but typically includes the critical evaluation of the findings, (which is 'the better solution')[10] or policy recommendations.[11] No different method has been developed for comparative research in property law.[12]

Each of the stages of the functional method has problems of its own that cannot be addressed in detail here.[13] In general, these pitfalls come from two sources: the difficulty of acquiring a proper understanding of the law of a foreign jurisdiction, especially, of the law in action and its extra-legal context;[14] and its inherent bias towards finding similarities and overlooking differences, coming from its initial assumption that different societies face similar functional problems.[15] In the case of

[6] Zweigert and Kötz (n 5) 34.
[7] ibid 36; Siems (n 5) 16, 32.
[8] Michele Graziadei, 'The Functionalist Heritage' in Pierre Legrand (ed), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 101, 102; Siems (n 5) 15.
[9] Zweigert and Kötz (n 5) 41, 43–45, 64–73; Siems (n 5) 17–29.
[10] Zweigert and Kötz (n 5) 47.
[11] Siems (n 5) 28.
[12] See Bram Akkermans, 'The Comparative Method in Property Law' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave 2016).
[13] For a recent summary, see Kischel (n 5) 90–101.
[14] See Zweigert and Kötz (n 5) 36–42; Siems (n 5) 22; Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 415–418; Kischel (n 5) 32.
[15] See Ralf Michaels, 'Comparative Law' in Jürgen Basedow, Klaus J Hopt and Reinhard Zimmermann (eds), *Max Planck Encyclopedia of European Private Law* (OUP 2012) 298, summarizing the criticism of the 'cultural comparison' movement.

property law, these challenges are increased due to the highly divergent conceptual language used across legal traditions.[16] This difference is so deep that continental lawyers are normally not able to grasp the feudally-influenced terminology of English property law, while a common lawyer might be baffled by the absence of 'estates' in civil codes.[17]

As discussed in detail in Chapters 3 and 4, comparative property law, including its research on the *numerus clausus,* has been affected by both problems. For example, some English scholars have both criticised the excessive enthusiasm with which some common lawyers have assumed the existence of a 'civilian' *numerus clausus* in their own tradition, as well as argued that the continental scholars that have led the comparative research in this field do not realize that some key elements of English property law are inconsistent with the civilian idea of *numerus clausus*.[18]

The most frequently proposed ways to overcome these pitfalls can be reduced to two general recipes: spending enough effort to get truly immersed in the law and mentality of each system and, relying on other social sciences or interdisciplinary approaches to place this understanding in the proper context.[19] The problem is that this creates two new challenges. First, understanding even the basics of another legal system is immensely time-consuming, especially when it requires knowledge of a foreign language.[20] Second, resorting to interdisciplinary research creates the risk of inadvertently importing bias from other disciplines into the analysis.[21]

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[16] Akkermans (n 12) 94–95, 99.
[17] Michele Graziadei, 'The Structure of Property Ownership and the Common Law/Civil Law Divide' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 72, 74.
[18] E.g., see Peter Sparkes, 'Certainty of Property: Numerus Clausus or the Rule with No Name?' (2012) 20 Euro Rev Priv L 769, 771–774, 798–799, 804.
[19] See Michaels, 'The Functional Method of Comparative Law' (n 2) 376, 377; Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart 2014) 6, 61; Zweigert and Kötz (n 5) 44; Siems (n 5) 22; Dannemann (n 14) 417–418; Esin Örücu, 'Developing Comparative Law' in Esin Örücü and David Nelken (eds), *Comparative Law A Handbook* (Hart 2007) 53.
[20] Kischel (n 5) 32.
[21] Florian Wagner-von Papp, 'Comparative Law & Economics and the Egg-Laying Wool-Milk Sow' (2014) 9 J Comp L 137, 148–152, referring to the use of economics.

This dissertation faces all these challenges. On the one hand, my basic legal training is not in English nor German law and I am not an English nor a German native speaker.[22] On the other, due to the approach of this dissertation, I will need to rely on many elements alien to the domestic property laws of England and Germany. The next subsection explains how I plan to overcome these pitfalls.

2.2. Overcoming the pitfalls

The strategy I will use to overcome the aforementioned pitfalls is based on modesty:[23] this dissertation deals with a narrowly defined problem, looks into only two jurisdictions, and I am fluent in the language of each. This modest scope allows for an ambitious approach, that attempts to combine a rich contextual account of the English and the German version of the *numerus clausus* principle with a broad interdisciplinary approach to its interactions with changing realities.

The research question of this dissertation was already stated in Chapter 1.1, but three further clarifications are needed. The first is a methodological caveat: my research problem breaches a basic rule of the functional method. Instead of framing a question in purely functional terms, it relies on normative criteria by assuming from the start that both English and Germany property law follow a principle of *numerus clausus*. However, the relevance of this unorthodoxy should not be overplayed. On the one hand, it is an assumption based on the leading domestic and comparative literature in this field and, on the other, I am not assuming that the doctrine has the same meaning in both jurisdictions. Indeed, Part II carefully assesses to what extent the domestic doctrines known under the same label in England in Germany are *actually* comparable.

[22] My native language is Spanish, and I obtained my primary law degree in Chile.
[23] See Kischel (n 5) 31–34.

The second issue is a further restriction of the scope of this research: this dissertation deals primarily (although not only) with land. There are good reasons for this that cannot be explained in detail here,[24] including its historically central role in property law[25] and economic production.[26] Maybe more important, land has some inherent characteristics, like its limited supply,[27] uniqueness[28] and durability,[29] that make temporality issues in land law extremely pressing.[30] However, this decision also responds to practical concerns: the status of the *numerus clausus* in England is far more certain in land law that in any other context.[31]

The third pending issue is justifying the election of England and Germany. From the perspective of the Theory of the Legal Families,[32] this choice can be justified in the fact that these jurisdictions have traditionally been seen as the heads and most representative members of the common law and the Germanic civil law families.[33] Second, in both jurisdictions the *numerus clausus* has a well-established position in private law doctrine,[34] ensuring that there will be meaningful domestic material to compare. Third, both jurisdictions have been at the center of the comparative research done in the context of European unification and harmonization efforts,[35] providing a body of literature to engage with.

Besides the basic decision of working with a limited number of jurisdictions, there are also some reasons to prefer these two systems over others, especially France and the

[24] See Jeremy Waldron, *The Right to Private Property* (OUP 1988) 33–37; Martin Dixon, 'A Doctrinal Approach to Property Law Scholarship: Who Cares and Why?' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave 2016) 7; Larissa Katz, 'Corporate Shares as Shares' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law*, vol 10 (Hart) 109–111.
[25] See Elizabeth Cooke, *Land Law* (2nd edn, OUP 2012) 6, 7; Ben McFarlane, *The Structure of Property Law* (Hart 2008) 6–12; Fritz Baur, Jürgen Baur and Rolf Stürner, *Sachenrecht* (18th edn, Beck 2009) 9, 167–168.
[26] See Paul A Samuelson and William D Nordhaus, *Economics* (19th edn, McGraw-Hill 2010) 9, 267–269, 503.
[27] ibid 269, 270.
[28] McFarlane (n 25) 7.
[29] ibid 7, 8.
[30] Richard A Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 WashU LQ 667, 669.
[31] See 4.3.
[32] See Zweigert and Kötz (n 5) 64–73.
[33] See ibid 132–275.
[34] See 4.2 and 4.3.
[35] See 3.1 and 4.1.

US. On the one hand, the US has not been part of the European comparative discussion[36] and the *numerus clausus* seems to have a less clear doctrinal standing in the US than in England.[37] In addition, some doctrinal elements that are key to understanding the *numerus clausus*, especially the impact of Equity in it, are more visible in England than in the US.[38] Nonetheless, due to the relevance that Law & Economics had in triggering the contemporary interest in the *numerus clausus* and the strong ties of American and English property theory, this dissertation will engage with American scholarship. On the other, whether French law still follows a principle of *numerus clausus* is becoming increasingly doubtful[39] and accounting for this (ongoing) development requires linguistic capabilities lack.

To avoid adopting biases inherent to comparative research, this dissertation will access the laws of England and Germany almost exclusively through the domestic sources available to native students, scholars and practitioners.[40] In the case of English law this has been done by relying on textbooks, treaties and scholarly articles, which has been greatly facilitated by being based in England, having an English property scholar as supervisor and having taught property law as a tutor at an English university alongside my PhD. In the case of German law, I have mostly relied on leading *Kommentare*to the BGB[41] (especially *Satudinger*, *Münchner* and *Palandt*), mainstream textbooks and scholarly articles. Accessing German sources has not always been easy, as up-dated versions of some of these materials are not always readily available in the UK, while a planned research visit to Germany was cancelled due to the Covid Pandemic. Nonetheless, older doctrinal findings have been checked

[36] For example, Van Erp and Akkermans's textbook does no address American law. Sjef Van Erp and Bram Akkermans (eds), *Cases, Materials and Text on Property Law* (Hart 2012) 31.
[37] See 4.1 and 6.2.
[38] On Equity in England and the US, Ben McFarlane, 'Equity', *The Oxford Handbook of New Private Law* (OUP 2021) 551–552.
[39] Christian von Bar, 'The Numerus Clausus of Property Rights: A European Principle?' in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart 2014) 445–447.
[40] For the BGB I am using the translation by Neil Mussett, continued by Samson Übersetzungen GmbH, Dr. Carmen v. Schöning available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3489.
[41] The main way in which legal doctrine is systematized in Germany. See Reinhard Zimmermann, 'Privatrechtliche Kommentare Im Internationalen Vergleich' in David Kästle-Lamparter, Niels Jansen and Reinhard Zimmermann (eds), *Juristische Kommentare: Ein internationaler Vergleich* (Mohr Siebeck 2020) 442–449.

against the latest editions of the *Palandt Kommentar*[42] (the 'flagship of German Private legal culture')[43] and *Staudingers Eckpfeiler des Zivilrechts*.[44] Navigating the (sometimes) cryptic style of *Kommentarliteratur* has been facilitated by being primarily trained and having taught in a civilian jurisdiction with a codified property system that shares the strongly Romanized base of German law,[45] and by discussing the basic doctrinal aspects of my research with a German scholar.[46]

Finally, this thesis devotes especial attention to the interface of property doctrine with the external world. This is largely done by relying on interdisciplinary approaches: Law & Economics, Legal History and Law & Society. This thesis also draws directly from a number of extra-legal disciplines, especially Economic History, New Institutional Economics (NIE), Philosophy, Urbanism and Public Policy. Being able to get sufficiently acquainted with the basics of these disciplines, especially when involving economic elements, was possible thanks to my previous training in some of these fields.[47]

2.3. Towards an interdisciplinary approach

The main methodological challenge of this dissertation consists in structuring a large number of elements coming from disconnected disciplines and jurisdictions into a coherent approach. I will do this in an original form, by combining three different frameworks coming from NIE, Anglo-American Property Theory and Comparative Law.

[42] *Palandt. Bürgerliches Gesetzbuch* (80th edn, Beck 2021).
[43] Zimmermann (n 41) 442.
[44] *Studinger BGB. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018).
[45] *i.e.*, Chile.
[46] Prof. Gerner-Beuerle had the generosity to give me feedback on the German law sections of this thesis.
[47] I have an MPP from a Chilean Economics School and an LLM from an American university, where I was exposed to Law & Economics and other interdisciplinary approaches.

The most general of these frameworks comes from Douglass North's 'Institutional Theory' and will serve to give coherence to the general thesis of this dissertation. According to North,[48] explaining economic performance in history requires complementing the basic neoclassical economic model (the same used by mainstream Law & Economics) with a theory of demographic change, a theory of the growth in the stock of knowledge and a theory of institutions, which is the cornerstone of North's approach. This theory is made of three basic building blocks: a theory of property rights, a theory of the State and a theory of ideology. 'Property rights' are understood by North as human-created devices that reduce transactions costs and organize exchange, thereby setting the basic personal and group incentives of the economic system. Exploring the legal features of this 'building block' in England and Germany will be the topic of Chapter 3 (on the concept of a property right) and Chapter 4 (on the *numerus clausus*). In turn, property rights are created and enforced by the State, which is therefore ultimately responsible for the functioning of the property system. The role of the State in the operation of the *numerus clausus* will be the main concern of Chapter 5. Finally, the costs of maintaining and enforcing the property system derive from the worldview or 'ideology' that exists in the relevant community in a given moment. This will be the theme of Chapter 6, which discusses the function and justification of the *numerus clausus*. In North's framework, the stock of knowledge (*i.e.*, technology) has a central role in the evolution of property rights. Thus, most of the social and economic changes discussed in Chapter 7 and 8 are linked to technological development.

The second framework comes from Anglo-American property theory, more precisely, from James Penner's distinction between two different and distinctive third-party effects of property rights: their ability to bind successors in title ('successor liability') and their ability to bind strangers *in general* ('trespassory liability').[49] As shown in Chapter 3, although largely unexplored, this distinction has recently gained popularity

[48] Douglass C North, *Structure and Change in Economic History* (WWNorton 1981) 3-4,7-8, 11–12, 17–18, 49–53.
[49] James Penner, 'Duty and Liability in Respect of Funds' in John Lowry and Mistelis Loukas (eds), *Commercial Law: Perspectives and Practice* (Lexis Nexis Butterworths 2006) 215.

in English scholarship[50] and is also known to German doctrine.[51] Part III of this dissertation, which shows how the thesis advanced in Part II works in practice, relies on this distinction to argue that the impact of the *numerus clausus* on trespassory liability (Chapter 7) is different from that on successor liability (Chapter 8).

Finally, a loose version of the functional method of Comparative Law serves to structure the content of the different chapters. Each has separate sub-sections on English and German law, that account for the relevant legal features of each system in their own terms and place them into their wider social, economic and ideological context. In this process I faced a different panorama in each jurisdiction. In England many of these connections are apparent due to the inclination of its doctrine to approach the law by the contextual analysis of cases; while, in Germany, the abstract style of its doctrine tends to obscure these links: not in vain, Rudolf von Jhering ironically described the style of German doctrine, as a '*heaven of concepts*'.[52] However, by the same token German law offers systematic approaches that are not equally visible in England.

Despite this, in both cases, I have been able to discuss how several developments, spanning from the Industrial Revolution to the growing value of sports and leisure in contemporary societies, interface with property law. For this, I have frequently relied on work done by social and economic historians. This demands a final methodological caveat: this dissertation is about property law theory and doctrine, not about Legal History. Although many of the examples I rely upon are historical in the sense that they come from a (more or less) distant past, all of them relate to doctrines and principles that are still valid or relevant to contemporary English and German law. This will become apparent in the next chapter, as history still provides the leading analytical

[50] E.g., see Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1; William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (3th edition, OUP 2013) 180; Simon Douglas and Ben McFarlane, 'Defining Property Rights' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 240, 241.
[51] E.g., see Heinz Hübner and Joachim Riegner, *Sachenrecht* (Translatia 1948) 7; Hermann Eichler, *Institutionen Des Sachenrechts*, vol 1 (Duncker & Humblot 1954) 6, 7.
[52] Rudolf von Jhering, *Scherz Und Ernst in Der Jurisprudenz* (Breitkopf und Härtel 1884) 274–333.

framework to explain the divergence of civilian and common law property systems.[53] As said by Holmes 100 years ago, '*a page of history is worth a volume of logic*'.[54]

[53] See Van Erp and Akkermans (n 36) 53–55.
[54] *New York Trust Co. v. Eisner*, 256 US 345 (1921), 349.

Part II

Doctrine and Theory

CHAPTER 3

THE CONCEPT OF A PROPERTY RIGHT IN ENGLAND AND GERMANY

The principle of *numerus clausus* applies to 'property rights'. Considering the well-known divergence between civilian and common law property systems, it cannot simply be assumed that such 'property rights' are conceptually the same in England and Germany.[1] Thus, prior to comparing the doctrine of *numerus clausus* in both jurisdictions, this chapter will establish to what extent the objects of this principle are actually comparable. In doing this, I will not aim to find a *concept* of a property right that cuts through domestic definitions, but to account for the way its different *conceptions*[2] are understood within each legal system.

The chapter starts by placing itself within a strand searching for a 'conceptual' approach to comparative property law (3.1). Then, it analyses afresh how property rights are understood in Germany (3.2) and England (3.3) and ends by presenting a new comparative view on the conceptual nature of property rights (3.4). Its core conclusion is that, although English and German law share a basic understanding of property rights as entitlements enforceable against third parties, each system tends to focus on different third-party effects: English law approaches property rights from the perspective of their effects on successors in title, while German law focuses on their effects on third parties 'in general', including trespassers as well as successors. This difference will set the scene for the main conceptual tool I will later use to discuss the impact of the *numerus clausus* in legal change, namely the distinction between the effects that property rights have on successors and on trespassers.

[1] See Bram Akkermans, 'The Numerus Clausus of Property Rights' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 102.
[2] Using Waldron's terms. Jeremy Waldron, *The Right to Private Property* (OUP 1988) 31, 38–39, 41.

3.1. A conceptual-comparative approach

Property law has traditionally been the least explored area of comparative private law.[3] The main explanation for this are its well-known doctrinal differences across jurisdictions.[4] However, over the last two decades, this field has been on the rise,[5] dramatically increasing our knowledge regarding the differences, similarities and relations between the property laws of different jurisdictions, especially across the civil-common law divide.[6] The most basic finding of this literature is that property law is one of the most divergent areas of private law. According to Sjef van Erp, when it comes to comparing civilian and common law jurisdictions, traditional comparative law has seen the divergence of the central concepts of property law as so entrenched that any convergence would be impossible.[7] For example, in recent times, Michael Milo described their rules as '*completely different*'[8] and Sparkes as '*universes in parallel (…) with so much scope of variation that almost every conceivable rule of property law can be found in one or the other*'.[9] Even the most basic terms of the different national property systems are frequently said to not even have equivalents in other languages.[10] For Michele Graziadei, the crucial point of this divide is that civilian and common law property law have '*different ontologies*' that are so deep that continental lawyers are normally not able to grasp the feudally-influenced terminology of the

[3] See Sjef van Erp, 'Comparative Property Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1032; Jan Smits, *The Making of European Private Law* (Intersentia 2002) 245. Although, this is not valid for the trust. For example, Hein Kötz, *Trust Und Treuhand. Eine Rechtsvergleichende Darstellung Des Anglo-Amerikanischen Trust Und Funktionsverwandter Institute Des Deutschen Rechts* (Vandenhoeck & Ruprecht 1963).
[4] J Michael Milo, 'Property and Real Rights' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 727; van Erp (n 3) 1032.
[5] Michele Graziadei and Lionel Smith, 'Preface' in Michele Graziadei and Lionel Smith (eds), *Comparative property law: global perspectives* (Edward Elgar 2017) x; van Erp (n 3) 1034, 1036.
[6] E.g., Ugo Mattei, *Basic Principles of Property Law. A Comparative Legal and Economic Introduction* (Greenwood 2000); Sjef Van Erp and Bram Akkermans (eds), *Cases, Materials and Text on Property Law* (Hart 2012); Christian von Bar, *Gemeineuropäisches Sachenrecht Band 1: Grundlagen, Gegenstände Sachenrechtlichen Rechtsschutzes, Arten Und Erscheinungsformen Subjektiver Sachenrechte* (Beck 2015); Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017); Yaël Emerich, *Droit Commun Des Biens: Perspective Transsystémique* (Éditions Yvon Blais 2017).
[7] van Erp (n 3) 1032-1033.
[8] Milo (n 4) 727.
[9] Peter Sparkes, 'Certainty of Property: Numerus Clausus or the Rule with No Name?' (2012) 20 Euro Rev Priv L 769, 771.
[10] E.g., Paul Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property' in Lionel Smith (ed), *The Worlds of the Trust* (CUP 2013) 314, 317–319.

English LPA 1925, while a common lawyer might be baffled by the absence of 'estates' in civil codes.[11]

The dominant explanation for this divergence is the different genealogy of civilian and common law property law:[12] modern civilian property systems developed from the abolition of feudal law, the reception of Roman law and the emergence of national codification; English property law developed autonomously, without substantial reception of Roman law and with an important position given to feudal law, resting on case law without systematic codification.[13] Frequently, these explanations add further elements that account for the persistence of the divide. Doctrinal approaches highlight the impact of the *lex rei sitae* conflict rule,[14] this is, the private international law rule holding that the applicable law in the case of a dispute as to property rights is that of where the object is situated,[15] while Comparative Law & Economics has stressed that the high economic cost involved in modifying a property system once it is already 'up and running' creates a path-dependence effect that preserves the divergence over time.[16]

Consistent with this, comparative literature normally finds the core differences of civilian and common law property law in the historical development of a handful of central legal institutions in one tradition that are absent in the other: First, the reliance of civil codes on a well-defined unitary notion of ownership which does not exist in the common law.[17] Second and by the same token, the common law theory of estates has

[11] Michele Graziadei, 'The Structure of Property Ownership and the Common Law/Civil Law Divide' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 72, 74–75. In a similar line, Uwe Kischel, *Comparative Law* (Andrew Hammel tr, OUP 2019) 305.
[12] Graziadei (n 11) 76, 84; Yun-chien Chang and Henry Smith, 'An Economic Analysis of Civil versus Common Law Property' (2012) 88 Notre Dame L Rev 1.
[13] Smits (n 3) 74–94; Milo (n 4) 727.
[14] Milo (n 4) 726; Smits (n 3) 246; van Erp (n 3) 1032, 1045; Kischel (n 11) 305-306.
[15] E.g., Art. 4(1)(c) Rome I Regulation.
[16] E.g., Ugo Mattei, *Comparative Law and Economics* (University of Michigan Press 1997); Mattei (n 6) 20, 21; Chang and Smith (n 12); Yun-chien Chang and Henry E Smith, 'Structure and Style in Comparative Property Law' in Theodore Eisenberg and Giovanni B Ramello (eds), *Comparative Law and Economics* (Edward Elgar 2016).
[17] See van Erp (n 3) 1047; Graziadei (n 11) 73–76, 81, 84; Kischel (n 11) 305–306; H Patrick Glenn, *Legal Traditions of the World* (5th edn, OUP 2014) 149.

no place in civilian systems.[18] Third, civil and common law property systems are said to take opposite positions regarding the relationship between ownership and possession.[19] Finally, in common law systems, Equity has been said to create a *duplex ordo* of property rights that does not exist in civilian countries.[20] In this context, the trust is said to create the most salient difference between both traditions, as it allows common law systems to create parallel 'legal' and 'equitable' property rights over a single asset, which is at odds with the civilian 'taboo'[21] of the indivisible nature of unitary ownership.[22]

Recent research also highlights that the times of the watertight separation between both traditions are gone for good.[23] It is widely acknowledged that, despite their doctrinal differences, their property law is essentially inspired by the same basic market and private ownership ideology,[24] and Comparative Law & Economics has shown that the practical operation of these rules leads to similar outcomes.[25] Even at a doctrinal level, comparative researchers have identified some convergence. For example, Milo holds that civilian property systems are becoming more flexible, while the common law is becoming more systematic;[26] and van Erp has argued that, while case law has a growing influence in civilian property law, common law property law has become widely statutory.[27] Finally, authors also acknowledge that the property law of both traditions is facing similar new challenges, especially due to the impact of constitutional law and human rights.[28]

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[18] See van Erp (n 3) 1045; Kischel (n 11) 307; Graziadei (n 11) 73–76, 84.
[19] See James Gordley, *Foundations of Private Law* (OUP 2006) 50–52; Van Erp and Akkermans (n 6) 36.
[20] E.g., Milo (n 4) 727, 728; van Erp (n 3) 1047.
[21] Henry Hansmann and Ugo Mattei, 'The Function of Trust Law: A Comparative Legal and Economic Analysis' (1998) 73 NYU L Rev 434, 441, 442.
[22] van Erp (n 3) 1047; Smits (n 3) 262; Kischel (n 11) 312.
[23] E.g., Graziadei (n 11) 71.
[24] van Erp (n 3) 1032.
[25] Milo (n 4) 726, 727; Mattei (n 6) 18–21. E.g., Hansmann and Mattei (n 21) 438, 479.
[26] Milo (n 4) 727.
[27] van Erp (n 3) 1038.
[28] Milo (n 4) 727; van Erp (n 3) 1036.

Despite this, there is agreement that comparative property law remains underdeveloped.[29] One key gap, recently highlighted by Michele Graziadei and Lionel Smith, is the meagre comparative research done on conceptual aspects of property law.[30] Despite some recent progress,[31] this is apparent in the scarcity of comparative research done on the very concept of a 'property right'. In this regard, general works normally offer a few important, but still superficial findings. First, property rights are universally characterized and differentiated from obligations by their enforceability against third parties, an idea frequently condensed in the Latin terms '*erga omnes*'[32] or 'right *in rem*'[33]. Second, the scope of such effects is defined differently in civilian and common law jurisdictions: while in the former, third-party effects of property rights are characterized as 'absolute', meaning that they bind everyone, in the latter, third-party effects are defined by their effect on specific groups of third parties, which is normally attributed to the doctrine of relativity of title.[34] Third, in the common law, the central notion of property law (at least for land) is that of an 'estate', which is defined by the temporal extension of the holder's prerogative, while the cornerstone of civilian property systems is 'ownership', which is defined by the prerogative of its holder over the thing, not by its duration.[35] Finally, the division of legal and equitable ownership allowed by the common law trust is said to blur the clear distinction between property and obligations found in civilian systems.[36] Beyond that, there is not much more development. As a result, it should not come as a surprise that Graziadei recently argued that comparative property law needs to move from '*formulaic pronouncements*', towards a '*conceptual*' approach that brings different national understandings regarding the encoding of property rights into a common conversation.[37]

[29] See van Erp (n 3) 1036; Graziadei and Smith (n 5) x.
[30] Graziadei and Smith (n 5) xi.
[31] Graziadei (n 11) 78.
[32] E.g., Milo (n 4) 726; van Erp (n 3) 1048.
[33] E.g., Art. 24(1) EU Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (recast).
[34] E.g., van Erp (n 3) 1047.
[35] Graziadei (n 11) 77.
[36] E.g. Milo (n 4) 728; van Erp (n 3) 1047.
[37] Graziadei (n 11) 72, 94–95.

A main problem preventing a more sophisticated conceptual comparison of property law is the insufficient attention given to the systematic position of the concept of a property right within each tradition and to the impact of doctrinal complexity of the actual property rights of each national legal system. Despite mentioning that civilian private law is more 'systematic' than the common law, comparative studies give no relevant hints as to the place of property rights within such systems. In similar light, comparative law seems to neglect that the conceptual aspects of common law property law are probably best discussed in the lively Anglo-American theoretical debate about the nature of property rights,[38] not in private law doctrine. Finally, the frequently mentioned impact of constitutional law is not really been considered from a conceptual-comparative perspective. In addition, without necessarily being wrong, accounts of the specific doctrines that make up the national systems are frequently superficial, tending to obscure some conceptual aspects of property rights. This is especially true in the case of the trust, which is frequently and misleadingly[39] explained in comparative law by resorting to the division between 'legal' and 'equitable' ownership,[40] a '*metaphor that is as likely to confuse as it is to enlighten*'.[41] Finally, the fact that much of the recent research in comparative property law has been done in continental Europe[42] gives it a certain 'civilian flavour'[43] that might also hide some biases.[44] Bearing these in mind, the following two subsections will strive to give a new perspective on the German and English concepts of a property right.

[38] Graziadei accounts for this debate, but does not develop on its implications. See ibid 83.
[39] Matthews (n 10) 316, 317.
[40] E.g., van Erp (n 3) 1047; Smits (n 3) 264; Kischel (n 11) 312; Marius J de Waal, 'Trust Law', *Elgar Encyclopedia of Comparative Law* (Second Edition, Edward Elgar 2012) 927.
[41] Lionel D Smith, 'Trust and Patrimony' (2008) 38 Rev Gen Dr 379, 381.
[42] E.g., see Van Erp and Akkermans (n 6).
[43] For example, van Erp presents the common principles of property law in manner that reflects how property principles are presented in German doctrine. Cfr van Erp (n 3) 1048; with Fabian Klinck, 'Sachenrecht' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 1274–1275.
[44] For example, see van Erp comments on the works of von Bar and Emerich (see n 6), van Erp (n 3) 1036.

3.2. Germany: between Savigny and the Basic Law

In German law, the concept of a property right can be addressed from three different perspectives: (a) their position in the private law system, (b) the constitutional concept of ownership and (c) the specific property rights contained in the BGB. This subsection will look at each in turn.

(a) Property rights as part of private law

As highlighted by comparative research, German law conceptualizes property rights as 'absolute rights'. For German doctrine this means that property rights are 'absolute rights *in things*': one type of a larger category of absolute rights, which also includes other rights that are enforceable against everyone.[45] Thus, in German law, 'absoluteness' is not privative to property rights, but a general concept of private law.

Having a proper understanding of the 'absolute' nature of German property rights requires placing them within its larger systems of private law (*Privatrecht*). This is not possible without understanding that, in civilian systems, 'civil law' has a meaning that is alien to Anglo-American private law.[46] As in other civilian jurisdictions, in Germany, 'civil law' (*Bürgerliches Recht*), means '*general and common private law*'.[47] This 'civil law' forms a basic sub-system that provides the foundations of all private law, as its special parts build upon its principles and it always remains applicable as a default rule.[48]

German 'civil law' is codified in the 1900 BGB. Its style is highly technical, abstract and precise, and its contents are organized following the system of the 19th century

[45] See Fritz Baur, Jürgen Baur and Rolf Stürner, *Sachenrecht* (18th edn, Beck 2009) 6; Klinck (n 43) 1271; Sebastian Herrler and Hartmut Wiecke, 'Sachenrecht', *Palandt. Bürgerlicher Gesetzbuch mit Nebengesetzten* (80th edn, Beck 2021) 1535.
[46] See Kischel (n 11) 359.
[47] Hans Brox and Wolf-Dietrich Walker, *Allgemeiner Teil Des BGB* (36th edn, Vahlen 2012) 11, my translation.
[48] Karl Larenz and Manfred Wolf, *Allgemeiner Teil Des Bürgerlichen Rechts* (9th edn, Beck 2004) 12–13.

Pandectist School[49] (*Pandektensystem*).[50] Accordingly, the BGB has general and special parts, the former containing abstract concepts, definitions and rules that apply to more than one specific part.[51] In this structure, despite having its core regulation in Book 3, property rights are also regulated in the General Part (*Allgemeiner Teil*)[52] as one case of the broader category of 'private law relations' (*Privatrechtsverhältnisse*),[53] while some specific property rights are developed in a limited number of statutes developed outside the BGB.[54]

Understanding property rights as generic 'private law relations' provides the first key to the German concept of a property right. The 'private law relation' is the central concept of German private law,[55] as it applies to contracts, property, torts and restitution. In textbooks it is not infrequently said that these relations connect people either to other people or to things.[56] However, this is not completely accurate. Properly understood, private law relations are always relations between people. In the case of 'rights over things' these relations to things are enforceable against all others.[57] Hence, authors who speak of property rights as 'relations to things' are quick to add that, in these cases, a relation to a person will emerge as soon someone unlawfully interferes in the relation of the person with the thing.[58]

Private law relations have two main elements: subjective rights (*subjektive Rechte*) and legal duties (*rechtliche Pflichten).*[59] Subjective rights are said to be the key element of the relation. Definitions found in textbooks vary, but generally refer to a power provided by the law to the 'will' of a person for her self-determination, stressing

[49] For an explanation in English, see Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 135–148.
[50] Heinrich Honsell, 'Einleitung Zum BGB' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 14.
[51] Larenz and Wolf (n 48) 17; Brox and Walker (n 47) 24.
[52] Especially, §§ 90-103 BGB. Klinck (n 43) 1271; Jan Wilhelm, *Sachenrecht* (5th edn, De Gruyter 2016) 4.
[53] See Brox and Walker (n 47) 265–346; Larenz and Wolf (n 48) 225–348.
[54] Baur, Baur and Stürner (n 45) 8.
[55] Larenz and Wolf (n 48) 225.
[56] E.g., Brox and Walker (n 47) 265.
[57] Larenz and Wolf (n 48) 226.
[58] E.g., Brox and Walker (n 47) 265.
[59] See ibid; Larenz and Wolf (n 48) 231–235.

that the purpose of subjective rights is to provide individuals with a sphere of personal freedom.[60] Thus, following Savigny's ideas,[61] contemporary textbooks describe private law relations as governed by the 'will' of the person, frequently connecting this to Kantian and Hegelian ideas of self-determination.[62] Nowadays, this tends to pass unnoticed as an obvious feature of German private law. However, as pointed out by James Gordley, this emphasis on 'the will' is an outcome of a massive ideological shift experienced by Western private law during the early 19th century, consisting in replacing traditional justifications of private law based in Aristotelian concepts of commutative and distributive justice by the modern concept of 'free will'.[63] Accordingly, contemporary German doctrine still sees property law as ultimately underpinned by the recognition of private ownership as the free use of patrimony.[64] In a textbook example, the owner's subjective right over a thing enables her to do as she wishes in regards to it: she can place it in her room, let it gather dust in a basement or even destroy it.[65]

Depending on the object of the right and the circle of people affected by its correlative duties, private law relations take different specific forms. From the perspective of their content, property rights are dominion rights (*Herrschaftsrechte)* that give an absolute and direct power over physical things. These property rights come in two basic forms: ownership (*Eigentum*) and limited property rights (*beschränkte dingliche Rechte*). The first is an encompassing and time-unlimited right over a tangible thing (§§ 903 and 90 BGB); while the second are conceived as fragmentations of ownership, being always limited as to their content and, normally, also their duration. From the perspective of the duty bearers, property rights, like all other dominion rights,[66] are 'absolute', this is, they are good against everyone.[67] The core of absolute rights is described by Larenz and Wolf as an authorization or allowance coupled with a freedom space which is

[60] See Larenz and Wolf (n 48) 239–242; Brox and Walker (n 47) 268–269.
[61] Friedrich Carl von Savigny, *System Des Heutigen Römischen Rechts*, vol 1 (Veit & Comp 1840) 331–332.
[62] E.g., Larenz and Wolf (n 48) 21–22, 240–242.
[63] Gordley (n 19) 14–16. The content and relevance of this connection is explored in 6.3.
[64] E.g., Baur, Baur and Stürner (n 45) 1.
[65] Brox and Walker (n 47) 268; Larenz and Wolf (n 48) 241.
[66] i.e., personality rights and intangible property rights.
[67] For all, Larenz and Wolf (n 48) 250–251; Brox and Walker (n 47) 269–271.

secured by the law by excluding all others from it.[68] The first mention of the principle of *numerus clausus* in German textbooks normally arises in this context: absolute rights are limited in number and content because they must be easy to determine for everyone.[69]

(b) The constitutional concept of ownership

The above-mentioned understanding of property rights reflects the political ideas that inspired the BGB. The BGB was the product of the classical liberalism that became dominant in Germany during the 19th century.[70] By the middle of the century, the economic doctrine of the Manchester School, which favoured free markets and no-state intervention, had become very influential.[71] In this view, the law was expected to provide individual citizens with extensive freedom to conduct their business without external intervention, either from other citizens or the State.[72] Hence, and despite criticism pointing to the lack of social awareness of the EI,[73] the BGB was designed to be the core of a private law system underpinned by the individualistic ideas of freedom of contract and free ownership, which, at the time, were seen as instrumental in the development of Germany's modern industrial market economy.[74]

Over the 20th century this understanding of property rights was reshaped by constitutional developments underpinned by a very different ideology.[75] The start of this process was the inclusion of a provision acknowledging the social duties of ownership (*Sozialpflichtigkeit des Eigentums*) in the Constitution of the Weimar Republic,[76] which later found its way into Art. 14(2) GG.[77] It is widely acknowledged that the doctrine developed by the BVerfG based on this provision radically departed

[68] Larenz and Wolf (n 48) 228.
[69] E.g., ibid 252–253.
[70] ibid 30; Brox and Walker (n 47) 17.
[71] Honsell (n 50) 4.
[72] See ibid 7; Larenz and Wolf (n 48) 30.
[73] Especially, Otto Gierke, *Die Soziale Aufgabe Des Privatrechts* (Springer 1899).
[74] Honsell (n 50) 10–11, 13–14; Larenz and Wolf (n 48) 30–31; Brox and Walker (n 47) 15, 17.
[75] See KD Ewing, 'Economic Rights' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012).
[76] Art. 153(3) WRV.
[77] Baur, Baur and Stürner (n 45) 1.

from the private law understanding of property rights,[78] especially regarding ownership in land.[79] This view was consolidated in the 1981 *Gravel Pit Case* (*Nassauskiesungsbeschluss*),[80] in which the BVerfG declared that the concept of ownership protected by the GG must derive from itself and that its content cannot be established on the basis of infra-constitutional private law concepts.[81] By following this approach, the BVerfG departed from private law doctrine, which sees ownership as a natural right with an essential content, favouring an understanding that sees ownership simply as an institution to be delineated by the legislator within the limitations set forth by the GG.[82] This re-interpretation of ownership has relativized some traditional principles governing property law, facilitating public law limitations of property rights, in fields such as environmental, artistic and animal protection.[83] However, following the BVerfG, this does not deny that the constitutional protection of the right to private property is ultimately justified by its ability to provide a patrimonial space of freedom for the development of an autonomous life.[84]

When analysing the implications of these developments, German scholarship normally holds that there is a constitutional and a private law concept of ownership, each serving different purposes.[85] The main difference between both is that the former is wider than that the latter, encompassing almost any patrimonial interest, regardless of whether it counts as a property right from the perspective of private law, including, for example, non-disposable rights such as social security rights.[86] This divergence is explained by the different functions each concept has within the broader legal system. The private law concept is part of a relatively static body of rules that aims to peacefully

[78] Friedrich Quack, *Münchener Kommentar Zum Bürgerlichen Gesetzbuch. Sachenrecht*, vol 6 (Friedrich Quack ed, 3rd edn, Beck 1997) 18.
[79] Larenz and Wolf (n 48) 33; Reinhard Gaier, 'Einleitung Zum Sachenrecht' in Franz Jürgen Säcker and others (eds), *Münchner Kommentar zum BGB* (7th edn, Beck 2017) [26].
[80] BverfGE 58, 300.
[81] Christian Bumke and Andreas Voßkuhle, *German Constitutional Law. Introduction, Cases, and Principles* (Andrew Hammel tr, OUP 2019) 274–275.
[82] Quack (n 78) 3, 19; Gaier (n 79) [26].
[83] Quack (n 78) 3, 19; Gaier (n 79) [26].
[84] See BVerfGE 50, 290, 339.
[85] Dieter Schwab and Martin Löhnig, *Einführung in Das Zivilrecht* (20th edn, CF Müller 2016) 26–27; Wilhelm (n 52) 142–146.
[86] See Ulrich Hösch, *Eigentum Und Freiheit. Ein Beitrag Zur Inhaltlichen Bestimmung Der Gewahrleistung Des Eigentums Durch Art. 14 Abs. 1 Satz 1 GG* (Mohr Siebeck 2000) 27–31.

solve conflicts regarding the allocation of resources between individuals[87] that is too narrow to deal with wider political and economic dimensions involved in the allocation of resources in a modern society. This task is assumed by constitutional property law, which aims to articulate the general and the individual interest in the allocation of resources.[88]

(c) Ownership as a gateway to property law

Despite acknowledging the aforementioned developments, German property law doctrine normally addresses the concept of a property right relying on pure private law concepts.[89] Because it relies on a previous understanding of the concepts of 'a private law relation' coming from the General Part, when accounting for the structure of property law, doctrine is not concerned with the concept of 'a property right', but with specific 'property rights', especially, ownership.[90] Indeed, the original version of BGB does not even use the term 'property right' (*dingliches Recht*).[91] Its direct source is the *Motive* where it is used in contrast to 'personal rights' (*obligatorishe Rechte*).[92] Accordingly, property textbooks[93] and *Kommentare*[94] normally do not expand on the concept of a property right and, at most, stress its absolute nature to highlight its difference with obligations as the most common example of relative rights. This lack of emphasis on the conceptual nature of a property right can be attributed to the way the German property system is built: ownership is the encompassing property right over a thing. All other (limited) property rights are understood as fragmentations of it. Hence, 'ownership' and not 'property right' is the main doctrinal gateway to German property law.[95]

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87 Quack (n 78) 18.
88 Peter Badura, 'Eigentum' in Ernst Benda, Werner Maihofer and Hans-Jochen Vogel (eds), *Handbuch des Verfassungsrecht der Bundesrepublik Deutschland* (2nd edn, De Gruyter 1994) 329.
89 E.g., Marina Wellenhofer, *Sachenrecht* (34th edn, Beck 2019) 1–16.
90 See the structure of the leading textbook Baur, Baur and Stürner (n 45).
91 Since 2010, it is used in §§ 197 and 198 BGB.
92 Hans Hermann Seiler, 'Einleitung Zum Sachenrecht' in Elmar Bund and others (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Sellier & de Gruyter 2007) 18.
93 E.g., Wilhelm (n 52) 3; Wellenhofer (n 89) 2.
94 E.g., Klinck (n 43) 1271; Gaier (n 79) [4]; Seiler (n 92) 18–20.
95 For an example, see Wellenhofer (n 89) 1–27.

Nonetheless, the concept of a property right is still essential to place property law within the broader private law system, especially to separate it from the law of obligations. Savigny argued for a universal and clear-cut division between property law and the law of obligations, underpinned by the idea that each of these 'legal relations' apply to completely different real-life objects: property rights have the unfree nature as objects (*i.e.*, things); while, obligations have singular people as objects.[96] Following Savigny, Reinhold Johow, the drafter of the property section of the EI, understood this strict separation as an 'essentially correct' and as 'pure analytical deduction' resulting from the essence of these legal relations, presenting property law in the *Motive* as an autonomous part of private law (Book 3), completely separated from the law of obligations (Book 2).[97] As shown in Chapter 6.3, this had a decisive impact on the German understanding of the principle of *numerus clausus*.

In practice, this strict conceptual division between property and personal rights is softened by some borderline cases in which obligations receive protection against certain third parties,[98] a phenomenon German doctrine calls 'reification of obligations' (*Verdinglichung obligatorischer Rechte*).[99] From a comparative perspective, the most prominent case is the lease of land. Despite leases being understood as mere contracts that only give rise to personal rights, the lessee can enforce her rights against the lessor's successors in title, effectively converting her position into a *status.*[100] In Germany, this is coined in the formula 'sale does not break the lease' (§ 566 BGB), and has lead contemporary commentators to argue that leases have 'some

[96] See Savigny (n 61) 334–345, 367–379.
[97] Wolfgang Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (1990) 1/2 AcP 112, 112–115; Wolfgang Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' in Gerhard Köbler (ed), *Karl Kroeschell zum 60. Geburtstag dargelegt von Freunden, Schülern und Kollegen*, vol 60 (Verlag Peter Lang 1987) 632–633; Wolfgang Wiegand, 'Funktion Und Systematische Stellung Des Sachenrechts Im BGB' in Michael Martinek and Patrick L Sellier (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Eiführungsgesetz und Nebengesetzen. 100 Jahre BGB - 100 Jahre Staudinger* (Sellier & de Gruyter 1999) 108–110, my translation.
[98] Wilhelm (n 52) 50–56.
[99] Gerhard Dulckeit, *Die Verdinglichung Obligatorischer Rechte* (Mohr 1951).
[100] See van Erp (n 3) 1041.

proprietary elements',[101] especially in the residential context.[102] Nonetheless, from a doctrinal perspective, the lease is conceptually explained as giving rise to personal rights with third party effects, not to a property right.[103] Borderline cases such as this point to some unexplored similarities between English and German private law that will be discussed in Chapters 7 and 8.

3.3. England: between pragmatism and conceptualism

Different to German law, English property law is not systematically built from first principles, but evolved over time, and its approach has even been described as 'anti-conceptualist'.[104] Hence, identifying the concept of a property right in English law requires working in an inductive manner. This subsection will do this by (a) accounting for the fragmentary nature of English property law (b) discussing the idea of 'rights *in rem*' as its unifying principle and (c) exploring the influence of the 'bundle of rights' picture developed by the Anglo-American private law theory.

(a) The fragmentation of English property law

English property law lacks the systematic structure that codification has given to modern German property law. Not even land law, which was subject to major legislative reforms during the 20th century to make it simpler, constitutes a self-contained body of law, as its understating requires previous knowledge of property principles and vocabulary and the simultaneous understanding of a variety of legislation. Even if the interplay of statutory law and case law may amount to a coherent system, it can hardly be described in simple terms.[105]

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[101] Baur, Baur and Stürner (n 45) 393; Volker Emmerich, 'Miete' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 566-567.
[102] Emmerich (n 101) 956.
[103] E.g., ibid 982.
[104] E.g., Matthews (n 10) 313.
[105] FH Lawson and Bernard Rudden, *The Law of Property* (3rd edn, OUP 2002) 11, 19–20.

This complexity is increased by the lack of unity in the contents covered by English property law and the variety of its sources. On the one hand, it governs three separate domains which are usually not treated together: land law, personal property and trusts. On the other, as with the rest of English private law, relevant elements of it derive from Equity. The latter has made a significant contribution to property law, but has also increased its complexity by adding a longer list of 'equitable property rights' that behave differently to legal property rights.[106]

In comparative law, a first source of complexity in accounting for the common law concept of a property right is the doctrine of relativity of title. However, its content and conceptual implications are rarely explained. Even if terms such as 'possessory title' are not used in a stable and consistent way by commentators,[107] at least in English law, the doctrine can be sketched in general terms by the 'finders-keepers rule': in principle, when someone finds a chattel lost on someone else's land, the finder has a better title to it than the owner of the land and can assert such rights against the landowner and all others, except the original owner,[108] who in turn has a limited period to assert her right.[109]

The doctrine also applies to land, but there is some debate as to what extent registration has affected its relevance. For Elizabeth Cooke, the successive registration systems enacted in England since the 19th century progressively eroded its importance: under the current law, legal title is conclusively vested in the registered proprietor (s. 58 LRA 2002), while the limitation period for registered titles has been abolished (s. 96 LRA 2002), turning the doctrine practically irrelevant.[110] This perception has been challenged by authors who propose that there is nothing in the LRA 2002 expressly abrogating the doctrine of relativity of title, arguing that several of its provisions operate assuming that the existence of a registered title does not

[106] William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (3th edition, OUP 2013) 174, 180.
[107] Luke Rostill, *Possession, Relative Title, and Ownership in English Law* (OUP 2021) 25.
[108] See *Hannah v Peel* [1945] 1 KB 509, *Parker v British Airways Board* [1982] QB 1004 CA.
[109] See s. 3(1) Limitation Act 1980.
[110] Elizabeth Cooke, *Land Law* (2nd edn, OUP 2012) 243–245, 250–254. Cooke does not mention s. 58 LRA 2002 but it is necessary for a full account of her argument.

necessarily preclude other titles or interests in the same land, which may exist outside the register.[111]

A second difficulty arises from the doctrine of estates. Different to German law, in common law systems, individuals do not technically own land (the thing), but *estates* in land (rights in the thing).[112] This doctrine used to accept a variety of complex entitlements,[113] but at least in England, the 1922-1925 legislation simplified the system, leaving the fee simple and the leasehold as the only available legal estates (s.1(1) LPA 1925). From an historical perspective, the fee simple reflects the (now mostly nominal)[114] relation of the estate holder with the Crown (theoretically, the 'owner'), while the leasehold corresponds to that of the tenant with the landlord.[115] However, from a contemporary doctrinal and functional perspective, their central difference lies in their temporal dimension:[116] while the fee simple is an indefinite estate in land, the leasehold *must* have a limited duration.[117] This does not mean that 'ownership' is absent from English land law,[118] but its place is more that of an 'incident' to the legal estates: whoever has a large indefinite set of use privileges and control powers over land -leaseholder or freeholder- is seen as 'owning the land' at that moment:[119] in England, the very notion of '*land for a time*'[120] implies that estates are about ownership.[121] In turn, estates can be subject to a series of legal property interests (s. 1(2) LPA 1925), that do not confer 'ownership' in land (e.g., easements).

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111 Amy Goymour and Robin Hickey, 'The Continuing Relevance of Relativity of Title Under the Land Registration Act 2002' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Bloomsbury 2018); Rostill (n 107) 96–97.

112 JW Harris, *Property and Justice* (OUP 1996) 68–69; Susan Bright, 'Of Estates and Interest: A Tale of Ownership and Property Rights' in Susan Bright and John Dewar (eds), *Land Law. Themes and Perspectives* (OUP 1998) 530.

113 See AH Manchester, *A Modern Legal History of England and Wales, 1750-1950* (Butterworth 1980) 302.

114 In exceptional circumstances, land can still escheat to the Crown, see Ian Williams, 'The Certainty of Term Requirement in Leases: Nothing Lasts Forever' (2015) 74 CLJ 592, 599–600.

115 Cooke (n 110) 15.

116 Bright (n 112) 130.

117 *Street v Mountford* [1985] AC 809, *Prudential Assurance v London Residuary Body* [1991] UKHL 10, [1992]2 AC 386, HL. This does not imply that free holds are necessarily forever, as they can escheat. Williams (n 114).

118 For discussion, see Rostill (n 107) 166–168.

119 Harris (n 112) 68–74.

120 *Walsingham's Case* (1573) 2 Plowden 547 at 555.

121 See Bright (n 112) 530.

Equity adds a third layer of complexity, by providing for a longer list of 'equitable property rights' that behave differently to legal property rights: except for restrictive covenants, these rights are only binding upon a limited category of third parties, namely successors in title. However, equitable property rights do not form a homogenous category, as it clusters together rights that mirror legal property rights (e.g., equitable leases and easements), beneficial rights under a trust and 'other equitable property rights'.[122]

In this context, the trust - '*equity's greatest contribution to the law of property*' -[123] is the most important source of complexity. In common law jurisdictions, property rights not only can be held outright (for the benefit of the holder), but 'in trust' for another person.[124] This structure is invariably explained by its historical origins in the English court of Chancery,[125] which cannot be summarized here.[126] However, English property law cannot be sketched without mentioning how the trust impacts the position of the holder of the right (the trustee), the person (or people) for whose benefit it is held (the beneficiary/beneficiaries) and different third parties. The trustee, sometimes misleadingly called the 'legal owner', is the holder of the right and, as such, can manage and sell the property. However, because she holds the property right for the benefit of the beneficiary, misleadingly called 'beneficial' or 'equitable owner', she cannot treat it as her own: if the trustee neglects or destroys the property she breaches the trust, becoming liable to the beneficiary.[127] A point frequently missed by civilian lawyers, is that it is of the essence of the trust that placing a right under it does not alter its nature: the trustee remains the owner *vis a vis* third parties and thus is (normally) the only one entitled to exercise the rights associated with the trust property.[128] For example, in *re Brockbank* the Chancery Division held that the beneficiaries of a trust, although of full age and capacity, and together absolutely

[122] Swadling (n 106) 174, 180–181. For discussion, 7.2.
[123] Lawson and Rudden (n 105) 86.
[124] Swadling (n 106) 210; Lawson and Rudden (n 105) 86.
[125] See Ben McFarlane, 'Equity', *The Oxford Handbook of New Private Law* (OUP 2021) 549.
[126] For a summary, see Jeffrey Hackney, *Understanding Equity and Trusts* (Fontana Press 1987) 21–28.
[127] Lawson and Rudden (n 105) 86, 87.
[128] Matthews (n 10) 316–317.

entitled to the property, could not impose the nomination of a new trustee on the last remaining trustee, as this power is discretionary of the trustee.[129]

The trust is credited with providing private parties with flexible elements to structure their dealings.[130] Its main practical effect is facilitating the transfer of property by allowing the trustee to deal with it *as if* she held all the rights in it, regardless of their beneficial or legal nature.[131] Only in limited circumstances can the beneficiary enforce her equitable interest directly against third parties. First, if the trustee transfers the property without authority under the trust, the general position is that the beneficiary might recover the property from a third party, unless the later acquired the property in good faith, for value and without notice; and, second, in case of insolvency of the trustee, the beneficiary can enforce her 'equitable property rights' directly against the creditors of the trustee.[132]

In English land law, this scheme is widely affected by statutory law. At the height of the 'free trade campaign' for the reform of land law, the Settled Land Act 1882 introduced a statutory 'overreaching' system that transferred the interest of the beneficiaries from the land itself, to the land or to its proceeds, allowing the purchaser to ignore most beneficial interests,[133] if certain requirements were met.[134] The LPA 1925 kept this mechanism, making it applicable to registered and unregistered land, allowing the buyer to take free from most beneficial interests, as long as the transaction meets certain requirements as to the payment of capital (s. 27).[135] Thus, even if Equity might 'split' ownership in certain regards, from the perspective of third

[129] [1948] Ch 206.
[130] E.g., see McFarlane (n 125) 548–549; Hanoch Dagan and Irit Samet, 'Express Trust: The Dark Horse of the Liberal Property Regime', *Philosophical Foundations of the Law of Trusts (Simone Degeling et al eds., Forthcoming 2022)* 4–6, 24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3753282> accessed 28 January 2022.
[131] E.g., see s. 6(1) TOLATA 1996.
[132] Swadling (n 106) 213–214. In some cases, the assets do not vest in the trustee's bankrupt estate (see eg s. 283(3)(a) IA 1986): even in the absence of such an express provision, however, the assets are not available to the creditors of the trustee: see eg *Carter Holt Harvey v Commonwealth of Australia* [2019] HCA 20 at [26]-[27] (Kiefel CJ, Keane and Edelman JJ). For another unusual situation, see discussion on *Shell UK Ltd & ors v Total UK Ltd* & *ors,* [2010] EWCA Civ 180, [2011] QB 86 in 7.2.
[133] William Cornish and others, *Law and Society in England 1750-1950* (2nd edn, Hart 2019) 171, 176–177.
[134] See ss. 20, 21, 39 and 40.
[135] Swadling (n 106) 271.

parties, modern trust law essentially does the opposite: it concentrates the powers of disposition in one (or few) owners. Indeed, contemporary English authors have seen an important continuity in the position of the (legal) owner and the trustee *vis a vis* third parties, which is consistent with the idea that the trust does not fragment the trustee's rights, but rather keeps them in an undivided package, encumbering it with duties towards the beneficiary.[136]

(b) Property rights as rights *in rem*

The previous description does not offer much clarity as to the conceptual nature of property rights in England. Nonetheless, across all this doctrinal complexity, as in civilian systems, '*[t]he hallmark of a property right is its ability to bind strangers to its creation*'.[137] Similar to what happens in Germany, the *numerus clausus* normally first appears in this context, as a means to tell which rights have the ability to produce these effects.[138] Thus, not different to German law, English scholarship essentially understands property as 'rights *in rem'*,[139] a similarity already pointed out by A. M. Honoré in the 1950s.[140]

However, from a comparative perspective, it has been held that, due to the doctrine of relativity of title and the impact of the trust, common law property rights do not possess the same 'absolute' nature of civilian real rights. In this view, the defining feature of common law property rights is not their general impact on the rest of the world, but their effect *vis a vis* specific third parties that have not contracted with the holder of the interest.[141] This view is confirmed in *Akers v Samba Financial Group,*[142] where the

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136 E.g., Ben McFarlane, 'Trust, Property, and Rights (Philosophical Foundations of the Law of Express Trusts Conference Paper)' (2021) 9, 12, 23.
137 Swadling (n 106) 174.
138 ibid 175.
139 E.g., Peter Birks, 'Five Keys to Land Law' in Susan Bright and John Dewar (eds), *Land Law. Themes and Perspectives* (OUP 1998) 472, 473.
140 See AM Honoré, 'Rights of Exclusion and Immunities Against Divesting' (1959) 34 Tul L Rev 453, 453.
141 van Erp (n 3) 1047; Bernard Rudden, 'Economic Theory v. Property Law: The Numerus Clausus Problem' in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence. Third Series* (Clarendon 1987) 239.
142 [2017] AC 424.

UK Supreme Court denied the claim of the liquidators of a company seeking to set aside a transfer to a third party of certain shares held by a trustee for the benefit of the company. Lord Sumption stated that '*an equitable interest possesses the essential hallmark of any right* in rem*, namely that it is good against a third party into whose hands the property or its traceable proceeds may have come, subject to the rules of equity for the protection of bona fide purchasers for value without notice'.*[143] Thus, one way of understating the third-party effects of property rights in English law is that property rights do not need to be absolute to bind third parties. Accordingly, from a doctrinal perspective, property rights are frequently characterized in English scholarship by opposing them to personal rights and showing how the first bind third parties where the latter fail to do so, typically, comparing the effect of lease and licence on future owners of the land.[144] This view is confirmed by the circumstances that equitable property rights are said to be proprietary in nature, despite (normally) only being able to bind successors in title.[145]

However, reducing the conceptual nature of property rights to their ability of binding successors in title would be inaccurate. In common law jurisdictions, at least legal property rights, also have third-party effects that resemble the 'absolute' nature of civilian real rights. This is not obvious at first sight, because such effects are not immediately associated with property law, which concentrates in solving conflicting claims over the same assets. Different to civilian systems, which primarily defend owners from attack by strangers by actions that are seen as specific to property law,[146] in common law systems, this protection comes from tort law, typically, through negligence, trespass, nuisance (for land), and conversion (for goods).[147] These torts, are regularly only available for those holding property rights, not mere personal rights. For example, in *Hunter and ors v Canary Wharf*,[148] the House of Lords only granted

[143] [82].
[144] E.g, Bright (n 112) 529; Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law. Text, Cases and Materials* (5th edn, OUP 2021) 151–153, 195–196.
[145] See Swadling (n 106) 180.
[146] See 7.1.
[147] See Peter Cane, *Key Ideas in Tort Law* (Hart 2017) 7–31; Birks, Peter, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 KLJ 6–11; Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart 2011) 1.
[148] [1997] AC 665, HL.

damages against nuisance resulting from the construction of the Canary Wharf Tower in East London to plaintiffs holding property rights in land, rejecting the claims of those who only had licences; and negligence operates in a similar manner.[149] The availability of protection via tort law for, at least, legal property rights, shows that having an absolute effect is also a feature of English property rights, although it has been said that an audience needs to be 'reminded' of this.[150]

The latter creates a conceptual challenge for equitable property rights, which, in general, do not afford direct tort claims to its holder. In England, this has recently led some scholars to argue that equitable property rights -including rights of beneficiaries of a trust- should be seen as third type of rights, known as 'persistent rights'.[151] In this view, also advanced in comparative law,[152] equitable rights should not be understood as rights against things nor rights against persons, but as 'rights against rights': when B has a right against the right of A, *prima facie,* anyone who acquires A's right may come under a duty to B:[153] using the words of the High Court of Australia,[154] equitable property rights are better described not as interests that are '*carved out of a legal estate but impressed upon it*'.[155] From this perspective, Lord Sumption's argument misses that the third-party effects of beneficial rights in a trust are essentially different from those of legal property rights.[156] This can have relevant implications for the *numerus clausus*: does it mean 'persistent rights' are not subject to this principle and can be freely created by parties? This question will be answered in Chapter 4.3 and its implications will be discussed in Chapters 7.2 and 8.2.

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149 See *Cattle v Stockton Waterworks Co* [1975] LR 10 QB 453.
150 Ben McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law' in Nigel Gravells (ed), *Landmark Cases in Land Law* (Hart 2013) 2.
151 See Ben McFarlane, *The Structure of Property Law* (Hart 2008) 23–25; Ben McFarlane, 'Equity, Obligations and Third Parties' (2008) 2008 Sing J Legal Stud 308; Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1.
152 Smith, 'Trust and Patrimony' (n 41) 392.
153 McFarlane and Stevens (n 151) 1.
154 See Simon Douglas and Ben McFarlane, 'Defining Property Rights' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 240–241.
155 Per Brennan J., *DKLR Holding Co. (No. 2) Pty Ltd v Commissioner of Stamp Duties* (1982) 149 CLR 431, 474.
156 Ben McFarlane and Simon Douglas, 'Property, Analogy and Variety' [2022] OJLS 20–22, 25–26 <https://doi.org/10.1093/ojls/gqaa043>.

(c) Property as a bundle of rights?

A different conceptual approach to common law property rights emerges from a key theoretical debate that has been going on in Anglo-American scholarship since the beginning of the 20th century. Not that different from the strand later followed by the continental codifications,[157] at the height of English liberal thought,[158] Blackstone described the '*right of property*' as the '*sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individual in the universe*'.[159] However, over the following two centuries, the conceptual unity of property rights in Anglo-American legal theory collapsed under the pervasive influence of the metaphor of the 'bundle of rights'.[160] In the prevailing view,[161] the metaphor is presented as a combination of Wesley Hohfeld's analysis of jural relations in terms of 'opposites' and 'correlatives'[162] and Honoré's incidents of ownership.[163] One of Hohfeld's central aims was to make clear that rights *in rem* are not rights against things. In his view, this misunderstanding results from confusing a physical relation (with the asset) with a jural relation between people. Since law regulates relations with other human beings, in order to be clear and direct, all jural relations must be predicated by reference to them. *In rem* or 'multital' rights are characterized by Hohfeld as one of a large number of very similar rights availing against different people of the same class. For example, if A owns and occupies land, a large number of people (not necessarily all) are under a duty to A to keep off the land: so A's claim-right against B that B keep off the land is a multital right as it is one of a large number of very similar rights that A also has against, for example, C, D, E etc. The key to this idea is that the right against each of these third parties is a distinct

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157 Thomas C Grey, 'The Disintegration of Property' (1980) 22 Nomos 69, 73.
158 See Cornish and others (n 133) 65, 67.
159 William Blackstone, *Commentaries on the Laws of England*, vol 2 (11th edn, printed by A Strahan and W Woodfall 1791) 2.
160 Grey (n 157) 74, 81.
161 JE Penner, 'The Bundle of Rights Picture of Property' (1996) 43 UCLA L Rev 711, 712, 724–738.
162 See Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 31, 32; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710, 722–723.
163 AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays on Jurisprudence* (Clarendon Press 1961).

right, turning the traditional understanding of a 'property right' into a collection of discrete legal relations available against specific members of a group.[164]

The early development of the bundle metaphor is closely linked to the progressive agenda of the American Realist movement of the early 20th century and its aim to facilitate the use of regulation for social policies.[165] Under the takings clause of the American Constitution (Vth Amendment), individuals only have a right to compensation for loss when they are deprived of their property by the State.[166] The key implication of the bundle picture is that it is always possible to subtract rights from the bundle via regulation and still refer to property as 'a bundle of rights'.[167] During the New Deal, the bundle of rights idea was embodied in the Restatement of Property 1936, but the approach truly prospered with the Law & Economics movement after the 1970s[168] (although without its original progressive agenda),[169] until becoming the prevailing understanding of property in mainstream Anglo-American legal philosophy.[170]

In this process, the bundle picture also reached English doctrine.[171] However, considering the radical difference between the American and the British constitutions,[172] and the scarcer influence of Realism and Law & Economics in English legal thought,[173] the place of the bundle picture in England needs to be assessed carefully. The UK is an 'extreme outsider' among modern liberal democracies, as it

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[164] Hohfeld (n 162) 718–721.
[165] Grey (n 157) 81; Thomas W Merrill and Henry E Smith, 'Making Coasean Property More Coasean' (2011) 54 JLE 77, 82; Henry E Smith, 'Property as the Law of Things' (2012) 125 Harv L Rev 1691, 1697; Henry E Smith, 'Introduction' in Kenneth Ayotte and Henry E Smith (eds), *Research Handbook on the Economics of Property Law* (Edward Elgar 2012) 1.
[166] See Tom Allen, 'The Right to Property' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2012) 507.
[167] Thomas W Merrill and Henry E Smith, *Property: Principles and Policies* (Foundation Press 2007) 16.
[168] Henry E Smith, 'Economics of Property Law' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 2: Private Law and Commercial Law* (OUP 2017) 152.
[169] See Ron Harris, 'The History and Historical Stance of Law and Economics' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (OUP 2018) 29–31.
[170] Penner, 'The Bundle of Rights Picture of Property' (n 161) 712.
[171] E.g., Cooke (n 110) 3.
[172] See Kischel (n 11) 338, 342.
[173] See PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law* (Clarendon Press 1987) 116, 117, 134, 141, 142; Zweigert and Kötz (n 49) 245–249; Kischel (n 11) 347, 348.

does not have a constitutional court in the American or German sense, making the idea that an Act passed by Parliament could be abrogated by a court alien to the English legal tradition.[174] Until recently, England lacked anything equivalent to the strong Takings Clause of the American Constitution. Following Tom Allen, even if, since the Middle Ages, the right to private property forms part of the fundamental law of the Kingdom, its enforceability by courts has historically been limited. Beyond the principle that the compulsory acquisition of property is normally subject to compensation, until very late, the restrictions of Parliamentary power remained unclear and there was no real scientific development of the principle.[175] The right to private property only achieved a clear constitutional status in England with the entering in force of the HRA 1998,[176] but its impact in English property law remains limited.[177] In consequence, the reception of the bundle picture in England seems better explained by its conceptual appeal, the wish of English scholarship to engage with its American counterpart[178] and its use by some influential progressive scholars.[179]

Since the end of the 20th century the bundle picture has been subject to a sustained attack.[180] James Penner first argued that the bundle picture has no explanatory power as it reduces property to a malleable device used to serve contingent policy concerns. He argued that property should be understood in terms of a duty of non-interference, which characterizes property rights as rights to exclude, and a notion of thinghood, which characterizes the object of property, serving to mediate between an owner and her legal relation to those subject to the duty of non-interference, ie, all others.[181] In his view the right to exclude others from the thing and the right to use it '*are opposite sides of the same coin*', with the former shaping the understanding of property, and

[174] Kischel (n 11) 339–340.
[175] Tom Allen, *Property and The Human Rights Act 1998* (Hart 2005) 8–9.
[176] See Article 1 First Protocol.
[177] See McFarlane, Hopkins and Nield (n 144) 147–148; Rachael Walsh, 'Stability and Predictability in English Property Law - the Impact of Article 8 of the European Convention on Human Rights Reassessed' (2015) 131 LQR 585, 600–603.
[178] E.g., Douglas and McFarlane (n 154).
[179] E.g., Kevin Gray, 'Property in Thin Air' (1991) 50 CLJ 252, 252, 259.
[180] Robert C Ellickson, 'Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith' (2011) 8 Econ Journal Watch 215, 218–219; Douglas and McFarlane (n 154) 219.
[181] Penner, 'The Bundle of Rights Picture of Property' (n 161) 714, 817.

the latter justifying it.[182] Building on this idea, Merrill and Smith developed an extensive theoretical account that justifies understanding property rights as rights in things. For them, thinghood is essential to the concept of a property right, because communicating the duty not to interfere with *a thing* to an anonymous public has much lower costs than communicating different duties not to interfere with *uses* of such thing.[183] In this effort, explicitly mentioning the German concept of *Sachenrecht*, Smith has argued in favour of understanding property law as 'the law of things'.[184] Over the last decades, the understanding of property rights by reference to different aspects of exclusion has become pervasive in common law property theory[185] and has been closely related to the interest of Anglo-American property theory in the *numerus clausus* principle.[186] However, there is an odd disconnection in this approach: although it defines property rights by their ability to exclude an indefinite number of third parties from the use of a thing, typically through tort law,[187] its actual examples almost always involve conflicts between the holder of rights and successors in title,[188] echoing the tendency of English doctrine to associate the 'basic structure' of property rights with successor liability.[189]

3.4. Concluding remarks

As usual in comparative law, the level of similarity of the English and German concepts of a property right is a matter of perspective. At a very general level, both concepts are ultimately defined by their ability to bind third parties; but, at a doctrinal level, they evidence significant differences. For this dissertation, what matters is to what extent

[182] JE Penner, *The Idea of Property in Law* (OUP 1997) 71. For an updated version, JE Penner, *Property Rights: A Re-Examination* (OUP 2020).
[183] See Thomas W Merrill and Henry E Smith, 'What Happened to Property Law in Economics?' (2001) 111 Yale LJ 357; Thomas W Merrill and Henry E Smith, 'The Property/Contract Interface' (2001) 101 Colum L Rev 773.
[184] Smith, 'Property as the Law of Things' (n 165).
[185] E.g., see Douglas and McFarlane (n 154) 243; Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 U Toronto L J 275.
[186] See Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale LJ 1; Merrill and Smith, 'What Happened to Property Law in Economics?' (n 183) 359, 385–388.
[187] E.g, Penner, *Property Rights: A Re-Examination* (n 182) 16.
[188] E.g., Smith, 'Property as the Law of Things' (n 165).
[189] E.g., McFarlane, *The Structure of Property Law* (n 151) 59–62.

these differences are relevant for the operation of the *numerus clausus*. This subsection addresses this by discussing (a) some essential differences in both concepts of a property right and (b) what they imply for legal change.

(a) On the concept of a property right

(i) Object

The Anglo-American picture of the 'bundle of rights' that highlights that rights *in rem* are not rights over things seems at odds with the BGB's understanding of property rights as rights in things. Nonetheless, if the English and German concepts of a property right are considered within their broader theoretical framework, this difference tends to disappear as, in both systems, property rights are ultimately understood as relations between people made of correlative active and passive elements that are mediated through things.

On the one hand, due to the heavy influence of Savigny's division between personal and property rights and the idea that property rights are conceptually differentiated from other absolute rights by having physical things as objects, German doctrine has traditionally emphasised the entitlement of the holder over a *thing* as the salient element of property rights. However, this does not deny that property rights are ultimately always relations between people. Nonetheless, this is only apparent when looking at the general notion of 'private law relation': practically all modern literature on the General Part of the BGB acknowledges, in one form or another, that property rights are a type of private law relation that links people to people through 'subjective rights' and 'legal duties' and that, in the case of property rights, these rights are 'absolute', meaning that they impose duties on everyone.

On the other hand, thanks to Hohfeld's finding that rights *in rem* cluster legal relations between people, Anglo-American private law theory also accepts that property rights involve correlative relations between the holder of the right and a large and indefinite

number of duty bearers.[190] Although the bundle picture obscured the importance of things in these relations, over the last decades, Anglo-American property law theory has re-discovered their role in mediating the *erga omnes* effect of Hohfeld's correlatives. In America, this view remains controversial, due to the '*serious image problems*' that understanding property as the 'law of things' inherited from Hohfeld's view.[191] In England this seems less controversial,[192] but its conceptual significance is downplayed by the emphasis doctrine puts on explaining that landowners do not own land (the thing), but rights in the thing (estates in land). The outcome is that Anglo-American property scholars have made sophisticated efforts to explain something that seems self-evident in German private law: that property rights are mediated through things.

The centrality of 'thinghood' in structuring the concept of property rights is underpinned by a deeper shared rationality: the role of the interest in using the thing as a justification for the rights to exclude. In German law, this is generally implied in the role that Kantian self-determination has in the justification of private law relations, which in the case of property law is supplemented by the Hegelian argument that sees ownership as essential to secure an external sphere for the unfolding of personal freedom.[193] By contrast, in the common law, the adoption of the 'will theory' during the 19th century was not primarily underpinned by Kantian and Hegelian philosophical ideas, [194] but by Pothier's Will Theory, loosely based on the natural law tradition[195] and the importance of the interest in using the thing was later blurred by the bundle picture. However, the centrality of things resurfaced in Anglo-American property theory after Penner argued that the right to exclude is justified by the interest of the owner in using the thing and was later fuelled by Merrill and Smith's argument regarding the role of thinghood in reducing the information costs of the operation of the property system. It is worth noting that, in German law, this link with information costs of communicating the *erga*

[190] I was not able to establish whether Hohfeld borrowed from Savigny, but it is likely that he was familiar with Savigny's ideas. See Michael Hoeflich, 'Savigny and His Anglo-American Disciples' (1989) 37 Am J Comp L 17, 18–23, 26, 27.
[191] See Smith, 'Property as the Law of Things' (n 165) 1691.
[192] E.g., see Douglas and McFarlane (n 154) 222.
[193] GWF Hegel, *Grundlinien Der Philosophie Des Rechts* (Meiner 2009) 66–69. See 6.3.
[194] Gordley (n 19) 15.
[195] David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001) 220–221.

omnes nature of property rights also exists, although it is not directly tied to the thing as carrier of information, but to the strict separation between rights against person and rights over things. Because rights over things affect everyone, their number and content must be standardized by the law, to allow everyone to easily know about their duties. The interactions of these elements will be central in the justification of the *numerus clausus* advanced in Chapter 6.4.

(ii) Scope

As previously argued by comparative lawyers, a main difference between the English and the German concept of a property right seems to be the scope of their third-party effects. While in Germany property rights are understood as 'absolute' rights, in England their third party-effects are typically described by reference to specific groups of individuals. In comparative law this is normally attributed to the doctrine of relativity of title. However, the impact of this doctrine is more apparent than real. Not only has it lost importance due to land registration, but, once it is understood in conjunction with limitations, its practical operation is not too different from the manner in which civilian jurisdictions deal with similar problems. For example, in German law, the buyer of a thing not subject to registration might acquire (absolute) ownership over it upon conveyance, regardless of the validity of the sale (§ 929 BGB). In cases where the sale is void but the transfer is valid, the original owner has an action ultimately based on unjust enrichment law (*Bereicherungrechts*) to recover the thing (§812 BGB), which will also be limited by time (*Verjährung*, §195 BGB). The practical outcome is that the buyer (new owner) will be able to assert her right over the thing against all but the original owner, who will be able to recover the thing, as long her claim is not barred by the lapse of time.

The enduring difference between the German 'absolute' conception of property rights and the more 'relative' notion prevailing in England is better explained by the tendency of each system to focus on different third-party effects to characterize property rights. In both England and Germany property rights have two distinct third-party effects: they protect its holder against third parties who interfere with the thing and against third

parties that later acquire property rights in the same thing. In the context of Anglo-American law, Penner has called them, respectively, 'trespassory' and 'successor' liability[196] and, in German law, authors as Hübner and Riegnar[197] and Eichler[198] called the first effect '*Ausschliessungsbefugnis*' (exclusion right) or '*Drittschutz*' (protection against third parties) and, the second, '*Sukzessionsschutz*' (protection against successors).

However, each system approaches property rights from a different perspective. German doctrine emphasizes the trespassory effects of property rights, as apparent in the central role that the recovery of possession and the protection against physical interference by third parties has in delineating the protection of ownership, while successor liability is seen as a self-evident consequence of this absolute effect. By contrast, as exemplified by Lord Sumption's judgment in *Akers*,[199] in English law, the existence of property rights that only affect successors in title, especially rights held in trust, make successor liability the implicit paradigm of the third-party effects of property rights.[200] Indeed, English scholars see successor liability as the source of the '*the basic tension of property law*',[201] implicitly excluding much of tort law from its scope. However, German law also provides for certain rights that might only bind successors in title, most notably, the right of the lessee, but does not label them as property rights. This opens the door to assessing these cases under the 'rights against right' thesis.[202] A further implication, almost completely overlooked until now in comparative analysis, is that an assessment of the impact of the *numerus clausus* in property law needs to distinguish between trespassory and successor liability.[203]

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196 James Penner, 'Duty and Liability in Respect of Funds' in John Lowry and Mistelis Loukas (eds), *Commercial Law: Perspectives and Practice* (Lexis Nexis Butterworths 2006).
197 Heinz Hübner and Joachim Riegner, *Sachenrecht* (Translatia 1948) 7.
198 Hermann Eichler, *Institutionen Des Sachenrechts*, vol 1 (Duncker & Humblot 1954) 6–7.
199 See 3.3.(b) above.
200 See Honoré (n 140).
201 E.g., McFarlane, *The Structure of Property Law* (n 151) 5–6.
202 As attempted with the French *propter rem* obligations. E.g., Remus Valsan, 'Rights against Rights and Real Obligations' in Lionel Smith (ed), *The Worlds of the Trust* (CUP 2013) 503–511.
203 As recently argued by Ben McFarlane for English law. Ben McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' in Susan Bright (ed), *Modern Studies in Property Law*, vol 6 (Hart 2011) 311.

(iii) Trust vs unitary ownership

The previous analysis is not enough to account for the impact of the trust in the comparative analysis of the concept of a property right. This topic has been widely thematized by scholars looking for its functional equivalent in civilian jurisdictions.[204] However, the image of the trust as creating a 'split' or 'double' ownership has been so pervasive, that two other aspects of it have been neglected: first, the ability of the beneficiary's rights to bind third parties is very limited; and second, the trust not only serves to separate ownership, but also to concentrate the power of disposition of the whole asset *vis a vis* third parties.

The first phenomenon is not unknown to civilian systems, where obligations underpinned by a proprietary aim, typically a relation between seller and buyer, might be enforced against successors in title[205] and creditors,[206] in manners that have been said to resemble the trust.[207] The second shows a striking functional and ideological similarity between two institutions that are normally seen at the heart of the civil-common law divide: trust and unitary ownership. As recently suggested by Graziadei, the practical development of the trust and the emergence of the unitary notion of ownership during the 19th century seem to have been driven by the same policy decision of concentrating the powers of alienation on a single hand in order to create a modern land market.[208] Consistent with this view, Ben McFarlane has recently highlighted the continuity in the position of the (legal) owner and the trustee.[209] As a result, the difference between civilian and common law systems seems to be technical rather than ideological: while the former opted for limiting the property rights that can be created in the same thing, the latter protected the purchaser by creating

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[204] E.g., Hansmann and Mattei (n 21); Stefan Grundmann, 'Trust and Treuhand at the End of the 20th Century - Key Problems and Shift of Interests' (1999) 47 Am J Comp L 401; Smith, 'Trust and Patrimony' (n 41); Matthews (n 10).
[205] See § 833 BGB and the judicially developed protection of the buyer's interest under a retention of title clause. See Wellenhofer (n 89) 165–168, 270–285.
[206] For example, the protection of the judicially developed 'security ownership' in insolvency cases, see § 771 ZPO and §§ 47 and 51(1) InsO). Wilhelm (n 52) 12.
[207] See 4.2.
[208] Graziadei (n 11) 81, 82, 87.
[209] E.g., McFarlane, 'Trust, Property, and Rights (Philosophical Foundations of the Law of Express Trusts Conference Paper)' (n 136) 9, 12, 23.

mechanisms (notably, overreaching) that allowed the buyer to acquire free from (most) equitable rights.[210]

(iv) Regulatory State

The bundle picture put forward in the early 20th century by American Legal Realism has a clear functional equivalent in Germany, but its doctrinal content is not found in private law. The political context leading to the enactment of the BGB and the strong allegiance of its drafters to the Pandectist tradition, meant that the demands for '*a drop of socialist oil*'[211] did not influence the code. However, with the rise of the Weimar Republic, a functionally equivalent idea developed at the constitutional level in the form of the 'social function of ownership'. This constitutional arrangement allowed German law to deal directly with the problems created by the need for State action over property rights, without the need of developing a new private law concept of a property right. In the US, this phenomenon was mirrored by the rise of the doctrine of regulatory takings in the 1920s.[212] The story of the later development of this doctrine is complex and cannot be summarized here, but it is worth noting that the 'bundle metaphor' played an important role in it.[213] This development seems to have been absent in English property law, due to the unique supremacy of the British Parliament and (probably) the strong political expectation that the State would not take property without compensation making it unnecessary. Hence, the rise of the regulatory state in Britain seems to have left no direct tangible marks in the English concept of a property right, other than the importation of the bundle metaphor. A good example is that, despite acknowledging its importance, the impact of public law is normally explicitly excluded from property law textbooks.[214] This shows how the impact of public regulation in property rights was channeled through different institutional arrangements in Germany, the US and the UK, and hints to a first key to explain how the core of the 19th century doctrinal structure of English and German property law

[210] On the compatibility of the trust with civil law ownership, see Matthews (n 10).
[211] Gierke (n 73).
[212] See *Pennsylvania Coal v. Mahon*, 260 US 393(1922).
[213] E.g., *Andrus v. Allard*, 444 U.S. 51 (1979); *Loretto v. Teleprompter Manhattan CATV Corp* 458 U.S. 419 (1982).
[214] E.g., McFarlane, Hopkins and Nield (n 144) 4–5.

seems to have reached the 21st century untouched. However, the core of this discussion involves elements of constitutional law that cannot be addressed here.

(b) On legal change

The comparison of the German and the English concept of a property right reveals a convergence towards the idea of 'rights over things enforceable against third parties' or 'rights against third parties mediated through things'. However, the path of this convergence is surprising. In Germany, where the rise of the regulatory State did not significantly impact property law doctrine, this concept is based on a theoretical framework that seems to be frozen in 1900; while in the common law, after a hundred-year long debate pushed by different utilitarian approaches, the concept of a property right seems to be reaching the same point where it has been in Germany since the dawn of the 20th century. Does this mean that the Anglo-American debate has been useless? Not at all. By reaching a similar concept by a different and accidental path, Anglo-American property scholarship has developed a sophisticated analytical framework to conceptualize property rights, including Hohfeld's legal relations, Penner's distinction between trespassory and successor liability, Merrill and Smith's attention to things as part of a strategy to communicate the right to exclude and the 'rights against rights' account of beneficial rights, advanced by authors such as McFarlane and Stevens.

This chapter has also shed some light on two features that are relevant to understand the process of legal change in property law. The first is the growing importance of regulation as a route to deal with new social and economic realities. As this process takes place in public law, its impact in private law is sometimes hard to identify, creating a certain illusion that property law has passed essentially unaltered from the 19th into the 21st century. This is especially the case of England and Germany, where the constitutional framework seems to have allowed regulation to operate very much in parallel to property law doctrine, with no point of contact with the *numerus clausus* doctrine. However, this impression is not entirely true. As apparent from the developments discussed in Chapter 8, the social and economic concerns that

underpinned the rise of the regulatory state during the 20th Century had a relevant impact in English and German property law, especially in connection to housing problems. Some of these concerns have even altered the *numerus clausus* of English and German property law.[215]

Finally, this chapter also points to the main doctrinal reason why property law needs to be stable. Different from contractual rights, the creation and change of a single property right might have vast and enduring effects over an indefinite number of people, including successors in title and strangers. Even if this might seem obvious, it can hardly be overstated. Across civilian and common law jurisdictions, the enforcement of property rights against third parties explains much of the doctrinal structure of property law. However, in England, binding successors in title seems to be enough to elevate a right to the status of a property right, while that is not the case for Germany. That is why a full understanding of the *numerus clausus* principle requires a more sophisticated approach to the distinction between successor and trespassory liability. The next chapter will continue in this path by accounting for the way the *numerus clausus* principle is understood in England and Germany.

[215] See 7.2, 8.2 and 8.3.

CHAPTER 4

THE NUMERUS CLAUSUS OF PROPERTY RIGHTS IN ENGLAND AND GERMANY

This dissertation aims to explain how private law systems subject to a *numerus clausus* of property rights deal with new circumstances. This chapter develops on the basic doctrinal elements needed to understand the German and the English version of this principle. This is by no means a novel endeavour. However, different to what has been done in mainstream comparative law, this chapter approaches the subject with some aims and perspectives that are specific to this project. First, it does not primarily aim to find out to what extent both versions of the principle are equivalent, but to understand them in their own terms and in connection to legal change. Second, it takes a narrower and more conceptual view, focusing almost exclusively on English and German law. Third, different to most comparative scholarship in this field, which has been made by civilian lawyers, it incorporates some elements of the recent English discussion on the nature of equitable property rights accounted for in Chapter 3.3. This chapter does not deal with the wider impact of the *numerus clausus* in the formal systems of legal sources nor with its justification. These topics are covered in Chapters 5 and 6.

This chapter starts by accounting for the place of the *numerus clausus* in comparative property law (4.1). Then, it develops on the doctrinal elements of the German (4.2) and the English (4.3) version of the principle, and its actual application by courts. Finally, it presents some concluding remarks (4.4). The main findings of this chapter are that: (i) both Germany and England limit the creation of new property rights by private parties and courts, but that: (ii) in each system, the creation of some rights with certain limited third party-effects is not covered by the principle, and (iii) the courts also occasionally deviate from the principle.

4.1. The *numerus clausus* in comparative law

The *numerus clausus* of property rights has recently been suggested as one of the most promising research lines to bring the different national ontologies of property law described in Chapter 3 into conversation.[1] This interest did not emerge in this field, but in a puzzle presented by economic thinking to property law, first analysed by Bernard Rudden in a comparative light[2] and then tackled by Thomas Merrill and Henry Smith[3] in the style of law & economics. Since then, this principle, previous virtually unknown to common law lawyers, has gained prominence in common law theory[4] and doctrine.[5] This interest has been matched with growing comparative research, boosted by the process of harmonization of European private law.[6] This process has been led by extensive research done by the so called 'Dutch School',[7] mostly covering the law of France, Germany, England and the Netherlands,[8] and has debunked previous conceptions seeing the *numerus clausus* as an exclusively civilian phenomenon.[9] As a consequence, nowadays, almost any general work in comparative property law reserves a special place for discussing the *numerus clausus*.[10]

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[1] Michele Graziadei, 'The Structure of Property Ownership and the Common Law/Civil Law Divide' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 78. In a similar line, Peter Sparkes, 'Certainty of Property: Numerus Clausus or the Rule with No Name?' (2012) 20 Euro Rev Priv L 769, 771.

[2] Bernard Rudden, 'Economic Theory v. Property Law: The Numerus Clausus Problem' in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence. Third Series* (Clarendon 1987) 239.

[3] Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale LJ 1.

[4] E.g., Henry Hansmann and Reinier Kraakman, 'Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights' (2002) 31 JLS 373; Anna Di Robilant, 'Property and Democratic Deliberation: The "Numerus Clausus" Principle and Democratic Experimentalism in Property Law' (2014) 62 Am J Comp L 367.

[5] E.g., Ben McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law' in Nigel Gravells (ed), *Landmark Cases in Land Law* (Hart 2013); Chris Bevan, 'The Doctrine of Benefit and Burden: Reforming the Law of Covenants and the Numerus Clausus "Problem"' (2018) 77 CLJ 72.

[6] E.g., see Sjef van Erp, 'A Numerus Quasi-Clausus of Property Rights as a Constitutive Element of a Future European Property Law' (2003) 7 EJCL; Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia 2008); Christian von Bar, 'The Numerus Clausus of Property Rights: A European Principle?' in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart 2014).

[7] See Sparkes (n 1) 772.

[8] Especially, Bram Akkerman's PhD thesis at the Maastricht University, supervised by Sjef van Erp. See Akkermans (n 6).

[9] On these conceptions, James Gordley, *Foundations of Private Law* (OUP 2006) 49.

[10] E.g., Jan Smits, *The Making of European Private Law* (Intersentia 2002) 249–254; Sjef van Erp, 'Comparative Property Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1049–1053; J Michael Milo, 'Property and Real

The main finding of this literature is that, in almost all modern legal systems, the number and content of property rights are limited by the law.[11] Hence, only legal interests that conform to one of a closed number of standardised forms are enforced as property rights by courts.[12] This is said to be a central difference with the law of contracts, which does not know inherent restrictions to the legally enforceable interests than can be created by private parties.[13] This literature also highlights that the *numerus clausus* has a different status across jurisdictions.[14] Most civilian systems, especially Germany, have long been conscious of this phenomenon, formally emboding it in the *numerus clausus* principle of property law.[15] Scholarship has also shown that the extent to which different civilian systems actually follow the principle varies. For example, Bram Akkermans[16] and Christian von Bar[17] report that the *numerus clausus* is relatively weak in France, where courts enforce it as loose 'principle,' while, in Germany, it is applied as a stringent 'rule'. Nonetheless, this literature also reports that German courts have occasionally stepped in to remedy some harsh effects of the strict application of the principle by enforcing rights outside the *numerus clausus* that, at the least, strongly resemble property rights, typically an 'anticipation right of the buyer' (*Antwartschaftsrecht*)[18] and an 'ownership for security purposes' (*Sicherheitseigentum*).[19] The most salient conclusion of this literature is that the principle of *numerus clausus* does not imply that private parties are deprived of all freedom to delineate property rights nor that the list of property forms is permanently closed.[20]

Rights' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 733–740; Bram Akkermans, 'The Numerus Clausus of Property Rights' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017).

[11] Rudden (n 2) 241–243, 260; Merrill and Smith (n 3) 68; Bar (n 6) 442; Akkermans (n 10) 100.

[12] Merrill and Smith (n 3) 3; Ben McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' in Susan Bright (ed), *Modern Studies in Property Law*, vol 6 (Hart 2011) 308.

[13] Merrill and Smith (n 3) 3; Akkermans (n 10) 100.

[14] Bar (n 6) 454; Akkermans (n 10) 105.

[15] Milo (n 10) 734; van Erp (n 10) 1042; Merrill and Smith (n 3) 4.

[16] Akkermans (n 10) 105–106.

[17] Bar (n 6) 444–445.

[18] E.g., van Erp (n 10) 1042; Milo (n 10) 737; Akkermans (n 10) 103, 104.

[19] E.g., Milo (n 10) 740; van Erp (n 10) 1038, 1043; Akkermans (n 6) 186–189.

[20] See van Erp (n 10) 1042–1045, discussing the civilian version.

By contrast, Law & Economics and comparative literature report that the *numerus clausus* principle has historically received little attention in the common law tradition.[21] For a long time, no formal name was attached to the principle[22] and, as a result, it is also harder to identify.[23] Nonetheless, comparative research acknowledges that, thanks to the law & economics movements,[24] the *numerus clausus* has also been addressed as such in common law scholarship over the last years,[25] adding an interesting policy aspect to the more doctrinally-oriented civilian legal systems.[26] English doctrine[27] and comparative research[28] link the principle to the 19th century common law[29] and the LPA 1925,[30] frequently discussing the emergence of the restrictive covenant in 19th century England as the paradigm of the judicial creation of property rights in this tradition.[31] The status of the principle in the US has been less studied from a comparative perspective, but in the context of the law & economics movement, the American version of the principle has been held to be better explained as a matter of judicial self-restraint[32] and comparative research has adopted such conclusion.[33] Consistent with this difference, comparative research highlights that the recent tendency in the common law has been to the growing awareness and formal recognition of the principle, while in civilian systems the trend is to test its flexibility.[34]

To what extent the civilian and the common law version of the principle are actually comparable is open to discussion. In England, some commentators have been skeptical regarding the enthusiasm with which some common law lawyers have

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21 Merrill and Smith (n 3) 4,5; Hansmann and Kraakman (n 4) 373, 374.
22 Merrill and Smith (n 3) 69.
23 Milo (n 10) 734.
24 Specially, Merrill and Smith (n 3).
25 Milo (n 10) 734.
26 van Erp (n 10) 1050.
27 See William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (3th edition, OUP 2013) 175, 176; Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law. Text, Cases and Materials* (5th edn, OUP 2021) 150–171.
28 See Sjef Van Erp and Bram Akkermans (eds), *Cases, Materials and Text on Property Law* (Hart 2012) 101; van Erp (n 10) 1050.
29 See *Keppell v Bailey* (1834) 2 My & K 517, 535 and *Hill v Tupper* (1863) 2 H & C 121, 159 ER 51.
30 See s. 1(1) (2) (3) and 4(1).
31 E.g., Akkermans (n 10) 101; McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 12).
32 Merrill and Smith (n 3) 9.
33 E.g., see Milo (n 10) 734.
34 ibid 735.

assumed the existence of the principle in their own tradition[35] and have approached the findings of the Dutch School in a critical light. For example, Peter Sparkes has argued that the lack of clarity of the Dutch approach regarding the situation of the *numerus clausus* in the common law results from assuming that its concept is so readily understood that any definition is superfluous, when, in reality, this is a civilian principle and its existence in England needs to be proven. He agrees that the English version of the *numerus clausus* comes from the 19th century common law and that it is legislatively embodied in the LPA 1925, but he adds that it does not have substantial similarity to the one found in the codified law of continental Europe. As discussed below, he suggests that the Dutch School does not realize that some key elements of English property law are inconsistent with the civilian idea of *numerus clausus,* including the varying meaning of 'property' in English law, the way the LPA 1925 restricts equitable rights in land and the operation of the trust and overreaching.[36] Sparkes concludes that the convergence identified by the Dutch School only exists at a very abstract level, namely, in the broad idea that the law imposes limits on the property rights parties can create, but that this 'rule with no name' is applied differently in both traditions.[37]

This scepticism towards the findings of the Dutch School and other continental researchers must be taken seriously, at least regarding English law. One interesting feature that Sparkes does not mention is that the findings of these authors are not uniform and consistent. Even at the level of their more general and recent output,[38] this literature evidences some obscurity regarding the source and scope of the principle in England, especially in connection to equitable rights. Relying on mainstream domestic secondary literature (e.g., Swadling),[39] Michael Milo identifies that the leading opinion in England is that common law jurisdictions recognize the principle, at least for legal property rights,[40] but expresses some doubts as to whether

[35] E.g., Malcolm Merry, 'Landmark Cases in Land Law (Review)' (2013) 5 Conv 455, 455–456.
[36] On trust and overreaching, see 3.3. and 7.2.
[37] Sparkes (n 1) 772, 773, 788, 789–791, 799, 803, 804.
[38] To avoid confusion, I am primarily relying on the research output published by these authors in the most recent versions of the leading handbooks and legal encyclopedias in comparative law.
[39] Swadling (n 27).
[40] Milo (n 10) 734.

the trust blurs the separation between property rights and obligations and, thus, the principle of *numerus clausus*.[41] Akkermans find the sources of the principle in the 19th century common law and does not exclude equitable rights from its scope,[42] but his references to actual case law are imprecise[43] and he does not account for the LPA 1925 as its statutory source.[44] By contrast, Sjef van Erp links the principle to the LPA 1925 but does not distinguish the situation of equitable and legal property rights,[45] which Sparkes seems to attribute to an insufficient understanding of the provision on equitable rights contained in s. 4. LPA 1925. [46] In turn, Von Bar argues that there is no closed catalogue of equitable property rights,[47] but he also fails to discuss s. 4 LPA 1925. Relying on English literature that pre-dates the 'discovery' of the *numerus clausus* in English doctrine, he argues that equity is still of '*fertile age*',[48] despite the fact that, according to mainstream contemporary doctrine, at least in relation to the recognition of new types of equitable property right in land, '*equity may indeed be past the age of child-bearing*'.[49]

For this dissertation, a further problem of this research is that the issue of stability and change in property law is not its main concern. On the one hand, comparative literature has an implicit or explicit focus on proposing how to develop the property system, typically in the context of unification and harmonization of European private law,[50] devoting much of its effort to extensive reviews of national doctrine and case law, typically in an historical perspective, but lacking elaborated conceptual frameworks to account for such developments.[51] On the other, the research done in the style of Law

[41] ibid, pointing to the work of Swadling, discussed below.
[42] Akkermans (n 10) 101.
[43] Some of Akkerman's references confuse different cases. For example, in the passage referred in the previous footnote, he cites *Keppell v Bailey*, but describes the facts of *Hill v Tupper*. Both cases are relevant for the common law foundations of the *numerus clausus* but have different implications. For full citations, description and discussion of both cases, see n 127 and 132 and accompanying text.
[44] See Akkermans (n 10) 112.
[45] van Erp (n 10) 1050.
[46] Sparkes 789, 791
[47] Bar (n 6) 450.
[48] ibid 448.
[49] Swadling (n 27) 182.
[50] See Akkermans (n 6) 489–564; Sparkes (n 1) 804; Akkermans (n 10) 116–118.
[51] Even if comparative research reports the Law & Economics discussion, it does not really engage with it, nor applies or further develops its framework. E.g., see Akkermans (n 10) 108–111; van Erp (n 10) 1049, 1050.

& Economics, whilst offering some remarkable theoretical approaches, tends to be highly dependent on the American context and pays insufficient attention to elements alien to economic analysis. Hence, there is no encompassing conceptual framework regarding the impact of the *numerus clausus* in the process of legal change in property law. All this points to the need to achieve a better understanding of the *numerus clausus* in Germany and England before analysing its impact in the formal sources of law (Chapter 5) and its justification (Chapter 6).

4.2. Germany: the *numerus clausus* as a dogma of private law

(a) The *numerus clausus* in German property law

Comparative lawyers agree that the principle of *numerus clausus* lies at the heart of most civilian property systems, but also emphasize that it is expressed differently across jurisdictions.[52] In the case of Germany, the *numerus clausus* forms part of a wider group of well and long-established principles governing the law of property. They are laid down at the beginning of virtually any property law textbook or property section of a *Kommentar* and are said to provide this field with a distinct theoretical foundation within the general system of the BGB.[53] The importance of the *numerus clausus* in this context can hardly be overstated as it is the only one seen truly as unique to property law.[54] Indeed it is described as a 'corner stone'[55] and 'central dogma'[56] of German private law.

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[52] See van Erp (n 10) 1042; Van Erp and Akkermans (n 28) 112; Bar (n 6).
[53] See Jan Wilhelm, *Sachenrecht* (5th edn, De Gruyter 2016) 9–10; Fritz Baur, Jürgen Baur and Rolf Stürner, *Sachenrecht* (18th edn, Beck 2009) 35–41; Marina Wellenhofer, *Sachenrecht* (34th edn, Beck 2019) 27; Hans Hermann Seiler, 'Einleitung Zum Sachenrecht' in Elmar Bund and others (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Sellier & de Gruyter 2007) 6–7, 23–35; Reinhard Gaier, 'Einleitung Zum Sachenrecht' in Franz Jürgen Säcker and others (eds), *Münchner Kommentar zum BGB* (7th edn, Beck 2017) [9]-[23].
[54] E.g., Wilhelm (n 53) 10.
[55] E.g., Holger Fleischer, 'Der Numerus Clausus Der Sachenrechte Im Spiegel Der RechtsÖkonomie' in Thomas Eger and others (eds), *Internationalisierung des Rechts und seine ökonomische Analyse. Festschrift für Hans-Bernd Schäfer zum 65. Geburtstag* (Gabler Verlag 2008) 226.
[56] E.g., Wolfgang Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' in Gerhard Köbler (ed), *Karl Kroeschell zum 60. Geburtstag dargelegt von Freunden, Schülern und Kollegen*, vol 60 (Verlag Peter Lang 1987).

The existence and basic content of this principle is accepted with almost no discussion in German case law and doctrine.[57] According to its mainstream account, it holds that the law provides for a closed number of property rights from which private parties cannot deviate.[58] German scholarship frequently further explains the principle by distinguishing between the twin concepts of mandatory types (*Typenzwang*) and mandatory content (*Typenfixirung*). According to the first, parties are not allowed to create new property forms; pursuant to the second, parties cannot alter the content of the allowed forms beyond their legal boundaries.[59] The principle is well expressed in case law by a frequently cited 1967 ruling of the BayObLG which states that '*in the field of property law, the BGB follows the foundational principle of the closed list of property rights. This principle holds that the number and types of property rights are strictly determined by legislation and that their content is mandatorily prescribed (…),*'[60] and has been upheld in many other cases.[61]

Despite its importance, the principle of *numerus clausus* is not explicitly acknowledged by the black letter rules of the BGB.[62] Nonetheless, its existence seems so deeply entrenched in German legal culture[63] that many commentaries and textbooks introduce the principle without aiming to ground it in any formal authority.[64] When formal legal grounding is provided, it relies either in the systematic interpretation of some rules of the code or in the explicit text of the *Motive*. The systematic argument, normally credited to Philipp von Heck,[65] essentially holds that the wording used by the

[57] Fleischer (n 55) 126.
[58] Gaier (n 53) [9]; Seiler (n 53) 24; Wilhelm (n 53) 10; Wellenhofer (n 53) 27; Fabian Klinck, 'Sachenrecht' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 1274.
[59] Seiler (n 53) 23; Baur, Baur and Stürner (n 53) 3; Gaier (n 53) at 11; Sebastian Herrler and Hartmut Wiecke, 'Sachenrecht', *Palandt. Bürgerlicher Gesetzbuch mit Nebengesetzten* (80th edn, Beck 2021) 1535.
[60] BayObLG, 3. 2. 1967. NJW 1967, 1373, 1374, my translation.
[61] E.g., KG DNoZ 2006, 470, 471.
[62] Seiler (n 53) 24. The coining of the term is normally attributed to Philipp von Heck. Philipp von Heck, *Grundriss Des Sachenrechts* (Mohr 1930) [22]-[23].
[63] See Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' (n 56) 623.
[64] E.g., Gaier (n 53) [11]; Wellenhofer (n 53) 27–28; Herrler and Wiecke (n 59) 1535.
[65] von Heck (n 62).

code when authorizing the creation of specific limited property rights (specially § 1018 BGB) implies that these are also the *only* possible such rights.[66] The second argument, especially explored by Wolfgang Wiegand as part of an effort to develop a substantive justification for *numerus clausus*,[67] relies on a section of the *Motive* discussing the place of property law within the broader framework of the BGB. After justifying that need for a self-sufficient system of property law,[68] the *Motive* explicitly states that *'[t]herefore, it cannot be open to the parties to attribute proprietary nature to a right over things according to their wishes. The principle of freedom of contract, which governs the law of obligations, does not apply to property law. Here the reverse principle applies: the parties can only create the property rights authorized by legislation. The number of real rights is therefore necessarily closed'.*[69]

Probably because it seems as obvious, German doctrine does not explicitly discuss the scope of the *numerus clausus*: it applies to property rights, that is absolute rights in things. As argued in the conclusion of this chapter and in Chapter 8.3, this creates a conceptual gap that only becomes apparent when seen from a comparative perspective: rights that are not 'absolute' but are still able to bind successors in title are not seen by German doctrine as property rights. The most notable case is the lease in land, which, despite having some 'proprietary elements',[70] is totally absent from the discussion of the *numerus clausus*.

In accordance with the principle of *numerus clausus*, German property law has been primarily developed through legislation. Despite the richness of its property forms, since early on, the BGB came under pressure to extend its original list of property

[66] Seiler (n 53) 24; Wilhelm (n 53) 10.
[67] Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' (n 56); Wolfgang Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (1990) 1/2 AcP 112; Wolfgang Wiegand, 'Funktion Und Systematische Stellung Des Sachenrechts Im BGB' in Michael Martinek and Patrick L Sellier (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Eiführungsgesetz und Nebengesetzen. 100 Jahre BGB - 100 Jahre Staudinger* (Sellier & de Gruyter 1999).
[68] See 3.2 and 6.3.
[69] Vol III, p. 3, my translation.
[70] See 3.2.

rights.[71] Part of this pressure, especially involving housing problems, was released by the statutory expansion or enactment of new property forms, particularly a *superficies* right (*Erbbaurecht)*[72] and a special flat-ownership right (*Wohnungseitentum).*[73] Under the general rules of the BGB, buildings are normally part and parcel of the land (§ 94(1) BGB) and cannot be subject to separate ownership (§ 93 BGB). The only exception contained in the original text of the code was a weak *superficies* right, which provided for the creation of separate property rights over a building (former §§1012 to 1017 BGB). However, the drafters of the BGB saw such a right as unimportant and did not regulate it thoroughly. After the First World War, this regulation proved inadequate to overcome the increasing housing problems resulting from insufficient access to land, triggering the enactment of special legislation that delineated this right in reliable terms in order to, among others, facilitate its use as a collateral.[74] Since then, this regulation has been modified many times, being recently fully re-enacted.[75] In a similar fashion, the BGB did not provide for the creation of separate ownership rights in different parts of the same building (§§ 94, 946 BGB). Once again, faced with massive housing problems of post-war Germany, the first Bundestag passed legislation, allowing parties to combine joint ownership over land (*Miteigentum*), with a special separate ownership over flats in such buildings (*Sondereigentum*) and providing extensive regulation for the management of the common building and the avoidance of conflicts between the joint owners.[76] As discussed in Chapter 8.3, these developments are relevant to test the limits of the of the generative powers of the modular theory of property rights accounted for in Chapter 1.5.

(b) Judicial development of property law in Germany

As said, according to the principle of *numerus clausus*, the creation of property rights is a matter of legislation (*Gesetz*). However, the practical acknowledgment by courts

[71] See Seiler (n 53) 26, 38–39; Gaier (n 53) at 24; Wilhelm (n 53) 4; Karl Larenz and Manfred Wolf, *Allgemeiner Teil Des Bürgerlichen Rechts* (9th edn, Beck 2004) 43.
[72] ErbbauVO, ErbbauRG.
[73] WEG.
[74] Siegfried Räfle, *Erbbaurechtsverordnung* (De Gruyter 1986) 1–3.
[75] See notes 72 and 73.
[76] Wellenhofer (n 53) 20–26.

of a few rights not contained in the BGB nor in its complementary legislation that, at least, strongly resemble property rights, has forced German scholarship to account for the role of the judiciary in the development of the property system.[77] The approach of scholarship to this issue is not uniform. Sometimes these developments are presented as infringements to the *numerus clausus*,[78] but other times they are seen as an allowed 'extension of the law' (*Rechtsfortbildung),* that does not infringe the principle.[79]

To a certain extent, this seems to result from the different forms that *Rechtsfortbiluding* can take (e.g., legitimate and illegitimate,[80] immanent to the law (*gesetzimmanent*) and constructive (*gesetzübersteigend*)[81] and its somehow blurry limits with *Richterrecht* (judge made law).[82] However, the practical outcome of these different views does not seem too relevant. Despite the way in which these developments are qualified, the substantive outcome is that, in practice, German courts have further developed the property system, and this has not been seen as a massive or problematic invasion of legislative competence. According to Wiegand, the judicial creation of property rights should be seen as unproblematic, as the drafters of the BGB seem to have assumed that new property forms would develop by case law.[83] Indeed, it is not unusual to see descriptions of the *numerus clausus* in *Kommentare* holding that party autonomy to develop property forms is not limited to the rights available in legislation, as parties could also resort to customary law (*Gewohnheitsrecht*).[84] However, German courts do not seem comfortable openly assuming the power to develop property law. This is implicit in their reluctance to openly qualify these developments as giving rise to new property rights.[85] This view was confirmed by a

[77] Seiler (n 53) 38; Gaier (n 53) [13] and [24].
[78] E.g., Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (n 67) 128; Gaier (n 53) [13] and [24].
[79] E.g., Wellenhofer (n 53) 28; Larenz and Wolf (n 71) 95.
[80] See Helmut Coing and Heinrich Honsell, 'Einleitung Zum BGB', *J. von Staudingers Kommentar zum Bürgelichen Gestetzbuch mit Einführungsgesetz und Nebengesetzen* (Sellier & de Gruyter 2004) 91–127; Stefan Vogenauer, 'Statutory Interpretation' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 835.
[81] See Larenz and Wolf (n 71) 93–96.
[82] See Coing and Honsell (n 80) 96, 133–152; Larenz and Wolf (n 71) 93–96; Uwe Kischel, *Comparative Law* (Andrew Hammel tr, OUP 2019) 372. Also see 5.2.
[83] Wiegand, 'Funktion Und Systematische Stellung Des Sachenrechts Im BGB' (n 67) 115.
[84] E.g., Seiler (n 53) 23, 24; Gaier (n 53) [5].
[85] See BGHZ 30, 374, 377-378.

2013 ruling of the BGH, explicitly holding that the '*creation of private burdens not acknowledged by the numerus clausus of property law cannot succeed by means of judicial extension of the law [Rechtsfortbildung]'.*[86]

In practice, the pressure of changing social and economic circumstances has led to the judicial enforcement of rights with third-party effects that are not part of the *numerus clausus,* especially in the field of credit security, including a 'security ownership' over moveable goods (*Sicherheitseigentum*), an 'acquisition right' of the buyer (*Antwartschaftsrecht*), and a land charge (*Sicherungsgrundshuld*).[87] To what extent these rights are formally recognized as property rights and their creation seen as an infringement of the *numerus clausus* remains unsettled. For example, the *Münchner Kommentar* describes the acquisition right of the buyer as a violation of the *numerus clausus* that has now become part of customary law,[88] while Marina Wellenhoffer's textbook holds that the same rights developed without breach of this principle.[89] From a more general perspective, these developments have been seen as part of a general trend towards the relativization of the traditional strict separation of the law of obligations and property law.[90] For this dissertation, the relevant takeaway is that the coming into existence of these rights suggests that the doctrine of *numerus clausus* is either more flexible than assumed or, at least, not always strictly enforced, which, in practice, is very similar.

This phenomenon is well illustrated by the development of the right of 'ownership for security purposes' as a form of *Treuhand Eigentum*, literally, 'trust-hand ownership'. The *Treuhand* has been described in domestic scholarship as a traditional Germanic form of fragmented ownership,[91] not explicitly acknowledged by the BGB,[92] with strong

[86] BGH 13.9.2013. NJW 2013, 3515, 3518, my translation.
[87] Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' (n 56) 624; Seiler (n 53) 38; Gaier (n 53) [11]-[13]; Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (n 67) 128.
[88] Gaier (n 53) [11].
[89] Wellenhofer (n 53) 28. In a similar line, Larenz and Wolf (n 71) 95.
[90] Notably, Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (n 67) 121–138.
[91] Wilhelm (n 53) 12.
[92] Wellenhofer (n 53) 17.

resemblance to the common law trust.[93] The origin of contemporary security ownership is in the use of the *Treuhand* after purely conventional pledges were disallowed during the second half of the 19th century, leading private parties to find other creative ways to allow debtors to retain possession over the pledged asset.[94] In this context a ruling by the RG predating the entering into force of the BGB set the grounding for the 'exceptional treatment of the *Treuhand Eigentum*' in the case of security owners,[95] holding that *'an object that has been transferred to the debtor as his ownership, but under the agreement that such object shall not be treated by him as his ownership, might be owned legally by the debtor, but is not in his ownership from a material or economic perspective'.*[96]

The entering into force of the BGB radically undermined the doctrinal basis of this reasoning. § 1205 BGB enacted the strict Roman principle holding that pledges could only be granted by handing possession of the relevant asset to the creditor (*Faustpfanprinzip)*.[97] This created problems for merchants and industrialists who could not afford to handover their goods or equipment to access financing nor find professional lenders wishing to keep their assets in storage. However, despite lobbying by trade unions, the legislator did not change this principle.[98] In order to circumvent the restriction imposed by possessory pledges, parties relied on the rules of the *constitutum possessorium* ('constructive delivery')[99] to legally transfer assets from debtors to creditors, but agreeing that such transfer is only 'for security purposes', leaving the asset in possession of the debtor.[100] In this scheme, despite transferring the absolute ownership to the creditor, contractual limitations restrict the creditor's

[93] On the difference and similarities of trust and Treuhand, see in general Hein Kötz, *Trust Und Treuhand. Eine Rechtsvergleichende Darstellung Des Anglo-Amerikanischen Trust Und Funktionsverwandter Institute Des Deutschen Rechts* (Vandenhoeck & Ruprecht 1963).
[94] See Werner Schubert, 'Die Diskussion Über Eine Reform Des Rechts Der Mobiliarsicherheiten in Der Späten Kaiserzeit Und in Der Weimarer Zeit' (1990) 107 ZRG Germ Abt 132, 133.
[95] Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (n 67) 126; Wilhelm (n 53) 12.
[96] RGZ 45, 80, my translation.
[97] See Carsten Herresthal, 'Das Recht Der Kreditsicherung' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 666; Karl Larenz and Claus-Wilhelm Canaris, *Methodenslehre Der Rechtswissenschaft* (3rd edn, Springer 1996) 233–234.
[98] Schubert (n 94) 138.
[99] See § 930 BGB.
[100] Wilhelm (n 53) 12; Baur, Baur and Stürner (n 53) 785.

ownership over the asset to one thing: selling it to pay the debt in case of default.[101] However, when the right of the debtor (who has no formal ownership in the thing) clashed with that of other creditors or successors in title, the RG continued applying its old doctrine, allowing debtors to assert their rights in relation to the pledged asset against these third parties, and the BGH later followed suit, with some doctrinal modifications and correction[102]

In German doctrine, these effects have been explained by distinguishing between the internal and the external relations of the *Treuhand*. From an external perspective (that of third parties), the creditor is the only (and full) owner of the asset and can dispose freely of the thing. However, the internal relation between the debtor and creditor is governed by their contract.[103] Nonetheless, the internal (obligational) relations of the parties might affect third parties in two cases. As explained in Chapter 8.3, first, a third party that knows about the relation and still acts in a manner that affects it, can become liable in tort.[104] Second, in cases of insolvency of any of both parties or when a third party, who is a creditor of the formal owner of the asset, wants to seize the asset (*Vollstreckung*), legal ownership of the creditor is not decisive, as the object is not treated as having fully left the patrimony of the debtor.[105]

In practice, textbooks frequently treat ownership for security purposes as a property right or together with such rights.[106] Thus, this right has been seen as strong deviation from the strict separation of the law of property and the law of obligations,[107] developed without proper statutory support (*praeter legem*)[108] and suspected to be a property right outside the *numerus clausus*.[109] In particular, Wiegand argues that this is as an open infraction of the principle, as shown by the comparison with a case in which the

[101] Akkermans (n 6) 188; Baur, Baur and Stürner (n 53) 787, 805.
[102] Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (n 67) 126.
[103] E.g., see Wilhelm (n 53) 12; Wellenhofer (n 53) 17, 18; Baur, Baur and Stürner (n 53) 787.
[104] BGH NJW RR 1993, 367.
[105] This was first solved without statutory support, but is now enacted in §771 ZPO and §§ 47 and 51 InsO. See Larenz and Canaris (n 97) 235; Wilhelm (n 53) 13, 1091–1093; Baur, Baur and Stürner (n 53) 802–803, 805–806.
[106] E.g., Baur, Baur and Stürner (n 53) 784–824; Wilhelm (n 53) 1091–1093.
[107] Akkermans (n 6) 184.
[108] Larenz and Canaris (n 97) 233–234.
[109] See Wilhelm (n 53) 12.

Swiss Federal Court solved a similar problem in a similar form but openly acknowledging that this required disapplying the absolute principle of ownership,[110] which means that the *Treuhand* is an area of property law where the *numerus clausus* does not apply.[111] Since then, this view has been further developed by authors such as Stefan Grundmann, arguing that the *Treuhand* is better characterized as contractual fiduciary relation with third-party effects that are implicitly approved by the legislator.[112] As with the lease in land, this creates a legal interest that, despite been seen as an obligation, is able to bind successors in title.

The implications of this development for the German version of the *numerus clausus* are ambiguous. However, at least a few things seem clear: regardless of claiming a strict adherence to the principle, German courts are exceptionally willing to enforce certain rights with some kind of third-party effects with no clear statutory support. However, precisely because courts are reluctant to recognize that they are disapplying the *numerus clausus*, such developments are fitted within the pre-existing private law categories, as with the 'internal' and 'external' relations of the *Treuhand*. As argued in Chapter 9, this strong reliance on the pre-existing categories of private law suggests that new developments in property law might pass unnoticed as they tend to replicate the conceptual structure of the system.

4.3. England: the rise of a rule with no name

(a) The numerus clausus in English property law

In the common law, the *numerus clausus* principle has historically received little attention.[113] It is said to have developed as 'rule of judicial self-governance',[114] not

[110] Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (n 67) 127-128.
[111] Stefan Grundmann, 'Trust and Treuhand at the End of the 20th Century - Key Problems and Shift of Interests' (1999) 47 Am J Comp L 401, 411.
[112] See Stefan Grundmann, *Der Treuhandvertrag: Insbesondere Die Werbende Treuhand* (Beck 1997) Chapter 7.
[113] Merrill and Smith (n 3) 4–5; Hansmann and Kraakman (n 4) 373–374.
[114] Merrill and Smith (n 3) 9.

enjoying the same clear status it has in civilian systems.[115] For a long time, it did not even have a name.[116] However, thanks to the growing interest in the standardization of property rights among economic approaches to private law,[117] over the last decades English scholarship has extensively borrowed the civilian label of '*numerus clausus*' to describe the legal limitation on the free creation of novel property rights,[118] especially as part of the discussion as to whether new property rights should be enacted[119] or traditional dogmas of property law relaxed.[120] In practice, English judges do not resort to the language of the *numerus clausus*, but they still follow the rule that a right in land can only be proprietary if it can be categorized under one of the subsections of the LPA 1925.[121] As a consequence, at least for land law, contemporary English doctrine normally openly holds that property rights are subject to a 'closed list' or '*numerus clausus'* principle,[122] even though isolated authorities pointing to a different direction are also acknowledged.[123]

Due to its more silent development and the casuistic nature of the common law, in England, the principle of *numerus clausus* is normally not formulated with the same level of abstraction as in Germany, but is fleshed out from 19th century case law[124] and the LPA 1925.[125] When formulated in general terms, it is normally described as broadly stating that, if private parties want their rights to have a third party effect, such rights have to correspond to one of those legal or equitable property rights recognized by the law.[126] However, the content of the English version of the *numerus clausus* is only

[115] Milo (n 10) 734.
[116] Merrill and Smith (n 3) 69.
[117] Especially, Rudden (n 2); Merrill and Smith (n 3).
[118] E.g., Swadling (n 27) 175–177; McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law' (n 5); McFarlane, Hopkins and Nield (n 27) 164–165.
[119] E.g., McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 12).
[120] E.g., see William Swadling, 'Opening the Numerus Clausus' (2000) 116 LQR 354.
[121] Hanoch Dagan and Irit Samet, 'Express Trust: The Dark Horse of the Liberal Property Regime', *Philosophical Foundations of the Law of Trusts (Simone Degeling et al eds., Forthcoming 2022)* 29 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3753282> accessed 28 January 2022.
[122] E.g., Swadling (n 27) 175; Ben McFarlane, *The Structure of Property Law* (Hart 2008) 137; Simon Gardner and Emily MacKenzie, *An Introduction to Land Law* (4th edn, Hart 2015) 10–11.
[123] Swadling (n 27) 177, discussing *National Provincial Bank v Ainsworth*, [1965] AC 1174, HL.
[124] See ibid 175, 176; McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law' (n 5) 2; McFarlane, Hopkins and Nield (n 27) 150–171.
[125] McFarlane, Hopkins and Nield (n 27) 150–171.
[126] See McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law' (n 5) 2. In similar line, Gardner and MacKenzie (n 122) 10.

revealed by close attention to its common law sources and the historical origin of the LPA 1925

The leading case in this process was *Keppell v Bailey.*[127] The case concerned a 1795 agreement of the owners of three ironworks who formed a stock company to build a railway to link their facilities to a quarry. As part of this, the owners of the ironworks agreed to use the railroad to carry limestone and ironstone to their works, paying a fixed price per ton per mile to do so, binding themselves and their successors in title as covenantors. In 1833 one of the ironworks was sold to a third party (Mr. Bailey) who started to build a tramway to link its ironworks to another of his facilities. The shareholders relied on the covenant to obtain an *ex parte* injunction to prevent Mr. Bailey acting against the terms of the 1795 agreement.[128] In what has been said to be the most eloquent defence of the *numerus clausus* in the common law,[129] Lord Brougham held that agreements that did not create recognized types of proprietary rights were not enforceable against subsequent purchasers as property running with land and granted the motion to dissolve the injunction stating that '*it must not therefore be supposed that incidents of novel kind can be devised and attached to property at the fancy or caprice of any owner*'.[130]

According to McFarlane,[131] the principle laid down in *Keppell* was later expanded in *Hill v Tupper*.[132] In this case, a canal company had granted Mr. Hill the sole and exclusive right to hire out pleasure boats on its canal as part of a lease. Mr. Tupper, the landlord of a nearby pub also started hiring boats out on the canal for pleasure, leading to a claim for damages by Mr. Hill.[133] Relying on *Keppell*, Pollock CB stated that the question of the enforceability of Mr. Hill's exclusive rights acquired against Mr. Tupper depended on whether new species of property could be created or if the rights

[127] (1834) 2 My & K 517. For discussion, McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law' (n 5).
[128] ibid 3–5.
[129] See McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 12) 8.
[130] At 535. Discussed in 6.2 and 8.2.
[131] McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law' (n 5) 2, 9–12.
[132] (1863) 2 H & C 121, 159 ER 51
[133] ibid 5,6; McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 12) 308.

only existed in covenant, i.e., as a mere contractual promise. Under the influence of *Keppell*, Pollock CB rejected Mr. Hill's claim, holding that '*[a] new species of incorporeal hereditament [a property right] cannot be created at the will and pleasure of the owner of the property, but he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by act of parliament. A grantor may bind himself by covenant to allow any right he pleases over his property, but he cannot annex it to a new incident, so as to enable the grantee to sue in his own name for infringement of such a limited right as that now claimed*.'[134]

Despite not being always mentioned when accounting for the principle,[135] in England, at least for interests in land, the restriction on the free delineation of property rights was consolidated in a systematic form with the enactment of the LPA 1925. This Act standardized and limited the number of property rights in land, by providing that '*the only'* estates and interests that can subsist or be conveyed or created in law are those listed in s. 1(1) and (2) LPA 1925, that any other form of property right will take the form of equitable interest (s. 1(3) LPA 1925) and limiting the permissible equitable interests to those existing before its coming into force (s. 4(1) LPA 1925). By this means, the LPA 1925 is said to have made an explicit institutional division of authority in regard to the development of the property system, taking away from courts and private parties the power to create new property forms.[136] English land law textbooks normally hold that the lists of legal property rights acknowledged by the *numerus clausus* is found in LPA 1925.[137]

Despite its origin in 19th century common law and its enactment in the LPA 1925, the use of the '*numerus clausus'* label to designate the restriction on the free delineation of property rights in England is relatively new. The terminology was first borrowed from civilian systems by Bernard Rudden in the late 1980s to account for the legal restriction on the contractual creation of property rights across non-feudal societies.[138] However,

[134] (1863) 2 H & C 122, 127, 128.
[135] E.g., Swadling (n 27) 175–177.
[136] McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 12) 309; Gardner and MacKenzie (n 122) 11.
[137] E.g. McFarlane, Hopkins and Nield (n 27) 150–171; Gardner and MacKenzie (n 122) 11.
[138] Rudden (n 2) 241, 243.

its use in common law jurisdictions only took-off after the 2000s, thanks to a paper by Merrill and Smith addressing the economic justification of these restrictions.[139] Nowadays, the *numerus clausus* concept is firmly established in English legal literature. For example, relying on Rudden's work, Swadling's overview of property law holds that, as 'all developed legal systems', English law has a *numerus clausus* of property rights,[140] while McFarlane has extensively discussed why its common law roots are relevant today.[141] Practitioners texts do not use the numerus clausus terminology, but also acknowledge that '*proprietary interests are fixed by the law, and finite in number*'.[142]

Despite its undeniable success, the adoption of the civilian '*numerus clausus'* label in the common law tradition has also been met with some scepticism.[143] From a comparative perspective, Peter Sparkes has argued that common law authors, including Swadling, have adopted this civilian concept as a 'badge of honor', practically forcing it into the English legal system. He claims that the general formula identified by Rudden is a 'rule with no name', only reflecting a general principle of certainty regarding property rights. After comparing the civilian and the common law limitations on the free delineation of property rights, he concludes the civilian *numerus clausus* is only one way of implementing such wider principle, but that that it has no place in the English common law, especially due to the trust being essentially incompatible with the idea of closed list of property rights. In his view, the rights of beneficiaries under trusts cannot be subject to a *numerus clausus*, because overreaching takes over the function of the civilian *numerus clausus*.[144]

However, English authors who advocate for the *numerus clausus* do not see an incompatibility between such principle and the trust. Assessing their argument

[139] Merrill and Smith (n 3).
[140] Swadling (n 27) 175. In his view, this includes equitable property rights, ibid 180–182.
[141] See McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 12); McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law' (n 5).
[142] Stuart Bridge, Elizabeth Cooke and Martin Dixon, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2019) [26-016].
[143] E.g., Merry (n 35) 455–456 criticizing McFarlane.
[144] Sparkes (n 1) 771–772, 774, 790, 799, 804.

requires placing it in the wider (and unsettled) discussion on the conceptual nature of equitable property rights, accounted for in Chapter 3.3, as it ultimately depends on the wider thesis holding that equitable property rights constitute a class of rights ('persistent rights') that is conceptually different from both property rights and obligations, that is conceptually characterized by being only able to bind (some) successors in title.[145] In this context, Simon Douglas and Ben McFarlane accept that there is no *numerus clausus* of rights that can be held in trust, but argue that this does not alter the (modular) structure of such rights, as the duties that the trustee owes to the beneficiary do not affect strangers, because they do not come under any immediate duty to the beneficiary.[146] This view is not without critics,[147] and its validity will be reassessed in Chapter 8. For now, the key takeaway is the confirmation of the conclusion put forward in Chapter 3 that the effects of the *numerus clausus* need to be addressed by distinguishing their general effects on all strangers from their specific effects on successors in title.

In practice, in the modern era, common law courts have mostly declined to create new forms of property and there are no relevant examples of judicial abolition of existing property types.[148] In England, the principle has been affirmed in different occasions and contexts. For example, in *King v David Allen (Billposting) Ltd,*[149] the House of Lords denied the enforcement of a contract to affix bill posters on the side of cinema building against an assignee to a title of the building because it did not amount to a property right.[150] Following this trend, despite not having been recognized by name until recently, nearly all subsequent changes to the list of property rights in English

[145] Ben McFarlane, 'Equity, Obligations and Third Parties' (2008) 2008 Sing J Legal Stud 308; Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1. See 3.3.
[146] Simon Douglas and Ben McFarlane, 'Defining Property Rights' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 240–241; Ben McFarlane and Simon Douglas, 'Property, Analogy and Variety' [2022] OJLS forthcoming <https://doi.org/10.1093/ojls/gqaa043>.
[147] E.g., Simon Gardner, '"Persistent Rights" Appraised' in Nicholas Hopkins (ed), *Modern Studies in Property Law*, vol 7 (Hart 2013).
[148] Merrill and Smith (n 3) 20.
[149] [1916] 2 AC 54, HL.
[150] Swadling (n 27) 176. Further endorsement mentioned include C*lore v Theatrical Properties Ltd* [1936] 3 All ER 48, CA; *Ashburn Anstalt v Arnold* [1989] Ch 1, CA; and *Rhone v Stephens* [1994] 2 AC 310, HL.

land law have been achieved thorough Parliamentary action.[151] This is probably best exemplified first, by the refusal of the House of Lords to create an equitable right in a matrimonial home to protect a wife who had been deserted by her husband,[152] which resulted in the enactment of special legislation to tackle this problem only two years later,[153] and, more recently by its reluctance to derogate the terms of year rules of the lease and its call on the Law Commission to revise it.[154] Swadling reports that there is at least one authority holding that the list is not closed, but only hard to enter,[155] but that no right has ever been admitted to the list under its criteria.[156] However, as suggested below, recent case law shows that some property types are flexible enough to accommodate new forms within themselves.[157]

(b) Judicial development of property law in England

As in Germany, English courts have occasionally stepped in to solve practical problems derived from having a closed listed of property rights. In law & economics and comparative law the most discussed case is the development of the restrictive covenant during the mid-19th century. More recently, the UK Supreme Court seems to have expanded the scope of easements by admitting a novel 'recreational easement',[158] offering valuable new material to address the *numerus clausus* in English law after the entering into force of the LPA 1925.

Authors following law & economics[159] and comparative approaches[160] normally hold that that the restrictive covenant emerged from *Tulk v Moxhay.*[161] However, this is not completely accurate, as this case was only part of the starting point of a process that

[151] Merrill and Smith (n 3) 60.
[152] *Ainsworth*.
[153] Matrimonial Homes Act 1967, now Family Law Act 1986 secs. 30-32.
[154] *Prudential Assurance Co Ltd v London Residuary Body* [1992] 3 WLR 279, 287.
[155] *Ainsworth.*
[156] Swadling (n 27) 177.
[157] See discussion on *Regency Villas* below and in Chapter 8.2.
[158] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57.
[159] E.g., Merrill and Smith (n 3) 17.
[160] Milo (n 10) 736; Akkermans (n 10) 101.
[161] *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143.

took more than 60 years.[162] This development was triggered by the rise of the modern city.[163] By the mid 19th century, negative easements were sharply limited in number and responded to the needs of town or village life, while the burden of covenants respecting land could only be enforced against successors in title in the context of landlord-tenant relations.[164] However, as London developed into a modern mega-city, the desire of maintaining a certain general standard of amenity became increasingly important for prospective home owners, forcing developers to ensure that neighbourhoods would not deteriorate in the future by subdivision of houses, re-conversion into shops, the use of yards as washing lines, etc.[165] Thus, the restrictive covenant has been said to be a private form of city planning, predating statutory planning.[166]

In *Tulk*, the plaintiff had sold the freehold of a plot of land at Leicester Square to a purchaser, who covenanted for him and his successors in title to maintain the garden, not to cut the trees on it, and not to build on the square. After several transfers, Mr. Moxhay became the owner of such land and refused to comply with the covenant, despite knowing of its existence when he purchased it. The court granted an injunction to Mr. Tulk, preventing Mr. Moxhay from cutting trees and building on the square. In a short judgment, Lord Cottenham clearly rejected the view that equitable intervention was limited to cases in which the covenant runs at law, but did not definitely establish under what conditions equity would bind a third party to a covenant that does not run at law.[167]

Initially, this equitable intervention was understood to have been based on Mr. Moxhay having notice of the covenant.[168] However, by the end of the 1870s there was strong evidence for a different rationale. Based on a short reference to *Keppell* made by Lord

[162] Ben McFarlane, 'Tulk v Moxhay (1848)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart 2012) 203, 224.
[163] See Merrill and Smith (n 3) 16–17; McFarlane, 'Tulk v Moxhay (1848)' (n 162) 204–211.
[164] Merrill and Smith (n 3) 16; William Cornish and others, *Law and Society in England 1750-1950* (2nd edn, Hart 2019) 152–153.
[165] Cornish and others (n 164) 153.
[166] See Elizabeth Cooke, *Land Law* (2nd edn, OUP 2012) 34.
[167] McFarlane, 'Tulk v Moxhay (1848)' (n 162) 207–219, 217–218.
[168] ibid 219. For examples, see *Mattos v Gibson* (1849) 45 ER 108 or *Lucker v Dennis* (1877) 7 Ch D 227.

Cottenham, the binding effect of the covenant ceased to be grounded in the successor in title having notice of the promise, but rather in identifying the initial promise as an equity attached to the property that, as a pre-existing property right, could be asserted against the successor in title.[169] This re-interpretation of *Tulk* vindicated the argument made by Lord Brougham in *Keppell* holding that notice is not enough to bind third parties[170] and shifted the test for the enforceability of the covenant against successors in title to the content of the promise, shaping the modern rules on restrictive covenants in a period that lasted for more than twenty years.[171] According to the later decisions a promise only counts as a restrictive covenant if it imposes a duty consisting in not making a particular use of the land, the duty benefits other land of the promisee and the duty is not intended to be merely personal.[172] This emphasis on the substantive content of the rights will be instrumental in the thesis later advanced in Chapter 6.4 of this dissertation.

More recently, English law witnessed a new development regarding property rights in land that could be described as a *de facto* creation of a 'recreational easement'.[173] In English law, an easement is a proprietary right of the owner of 'dominant land' to enjoy a limited use of a plot of land owned by another, the 'servient land'. Following *Re Ellenborough Park*,[174] a decisive issue for a right to qualify as an easement is whether it 'accommodates land', meaning whether, as a matter of fact, it serves the '*normal enjoyment of the [dominant] property*'.[175] In *Ellenborough Park*, the court held that, as the dominant land was residential, the right to use a neighbouring garden did accommodate that land as it *did not* merely serve 'recreation' or 'amusement' purposes. However, in the recently decided *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* case,[176] the Supreme Court upheld a decision of the Court of

[169] ibid 220. For an example, see *Wilson* v Hart (1866) 1 Ch App 463.
[170] McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law' (n 5) 19.
[171] See McFarlane, 'Tulk v Moxhay (1848)' (n 162) 221–223.
[172] McFarlane, *The Structure of Property Law* (n 122) 885–891.
[173] See Susan Pascoe, 'Re-Evaluating Recreational Easements- New Norms for the Twenty-First Century?' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law*, vol 10 (Hart 2019).
[174] [1956] Ch 131, CA, at 163.
[175] Anna Lawson, 'Easements' in Louise Tee (ed), *Land Law: Issues, Debates, Policy* (Willan 2002) 73.
[176] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57.

Appeal holding that the right granted to the owner of a time share to use an Italian garden, a swimming pool and other sports facilities that might seem purely recreational did accommodate land as an easement, partly relying for this on the social transformation in the value of sport activities in the UK.[177] As discussed in Chapter 8.2., by this means, arguably, the UK Supreme Court has developed the property system within the constraints of the *numerus clausus*.

4.4. Concluding remarks

(a) On the principle of *numerus clausus*

Despite the deep difference in the style of German and English property law, the basic doctrinal content of their *numerus clausus* principles is surprisingly similar. On the one hand, the words used by Lord Brougham to ground the principle in *Keppell* are not that different from those found in the *Motive* of the BGB: both stress that private parties are not allowed to create new property rights and must content themselves with the property rights made available to them by the law. On the other, Heck's argument that the list of property rights found in the BGB is to be interpreted as exclusive ('these are the only') is very similar to the wording of the LPA 1925, stating that these are 'the only' admissible legal property rights and restricting equitable interests to those that could have been validly created before it. Thus, in both jurisdictions, the core of the principle can be described as a doctrine that determines what rights created by private parties will be binding upon third parties by using a list that can only be amended by the legislator.

Second, in practice, both jurisdictions also evidence a few (rather isolated) cases in which courts seem to have deviated from this basic principle. Despite being generally reluctant to develop the property system, when the economic and social needs of their time are pressing and the legislator does not act, both English and German courts

[177] [2017] EWCA Civ 238, [53]-[56].

have been ready to step in to provide practical solutions, as evidenced by the developments of the ownership for security purposes and the restrictive covenant. In this process, courts almost never openly create new property rights but claim to be only enforcing pre-existing private law structures, normally by changing the content inside the pre-existing modules of private law. For example, in *Regency Villas* the court did not create a new property right, nor abrogate the rule requiring the right to accommodate land nor the rule holding that the mere amusement of the owner does not accommodate land, but fitted the use of the sports facilities into the pre-exiting legal structure of the easement. Similarly, German doctrine claims that security ownership is consistent with the unitary notion of ownership, by distinguishing between the internal (contractual) relations of the parties and the external (proprietary) effects *vis a vis* third parties. To what extent these developments actually amount to the judicial creation of new property rights is subject to discussion, but the overall result is that English and German courts are willing, occasionally, to develop the property systems. The question is what justifies these developments.

Finally, the German and the English versions of the *numerus clausus* principle evidence a striking resemblance regarding their *scope* that has not been explored in depth from a comparative perspective: in both jurisdictions the impact of the *numerus clausus* on entitlements that only bind successors in title is, to say the least, unclear. In England, the topic has been thematized as part of the long-standing discussion about the nature of equitable property rights, but the issue remains highly contested. By contrast, in Germany, this issue has passed practically unnoticed.[178] There are two main reasons for this. On the one hand, the most obvious candidate to qualify as a 'persistent right' in German law -the lease in land[179] is primarily conceptualized as giving rise to personal rights, thereby seeming to fall outside the scope of the *numerus clausus*. On the other hand, cases such as the security ownership have been primarily approached under the question of whether their development implied a breach of the *numerus clausus*, without noting that its proprietary effect is constrained in a way that is very similar to the case of the lease. Indeed, the proprietary effects of both leases

[178] Although Akkermans notes the point, Akkermans (n 6) 401.
[179] See Chapter 3.2 (c).

and ownership for security purpose have been frequently described as contracts with far-reaching third-party effects, placing the issue of the justification of these effects in the law of obligations. From a comparative perspective this shows that both systems have entitlements that are hard to bring under the classical property rights-obligations divide, making the relevance of the *numerus clausus* in this 'grey zone' uncertain. As already argued is Chapter 3.4., this suggests that the common law 'rights against right' thesis might throw some light on the German borderline cases and that Equity does not make the list of property rights of the common law irremediably different from the civilian.

(b) On legal change

These findings point to four features relevant for the impact of the *numerus clausus* on the ability of property law to adapt itself to new realities. First, the content of the doctrine imposes two institutional restrictions on the development of property law. On the one hand it creates a legislative monopoly over property law, formally precluding the judicial development of the property system. The implication of this will be discussed in Chapter 5. On the other hand, it strongly restricts the freedom of individuals to create new or adapt the existing property rights to new circumstances themselves. The rationale for this will be topic of Chapter 6.

Second, the fact that, in practice, the *numerus clausus* has been occasionally breached by courts shows that the legislative monopoly over the property system is not strictly enforced, allowing judges some leeway to adapt property law to new circumstances. This is well reflected in the fact that the type of property rights developed in each jurisdiction seems to point to the comparative weakness of its list of acknowledged property rights. For example, the judicial creation of the German security ownership, evidences the need for property forms long known in the English common law, such as the trust and the floating charge. The case of the English restrictive covenant and recreational easement, partially reflects the need of adapting property law to contexts that were consciously addressed by the BGB and the special

legislation enacted to deal with housing problems after both wars.[180] This triggers a further conceptual question: how are these deviations justified? This will also be addressed in Chapters 5.4 and 6.4.

Third, the dubious applicability of the *numerus clausus* principle to rights that can only bind successors in title suggests that the effects of this doctrine on party autonomy are less stringent than previously assumed, thereby allowing private parties to (partially) adapt the property systems to their needs. For this dissertation, this implies that assessing the impact of the *numerus clausus* on property law requires distinguishing between the effects that the principle has on the creation of duties that affect successors in title and on other third parties. That will be central distinction of Part III.

Finally, the brief mention of the importance of the content of the covenant in *Tulk* hints to what will be one of the main arguments advanced in this thesis: the *numerus clausus* is not only about standardization, but also about ensuring that the third-party effects of property rights have a specific content, namely, one that minimizes their impact on personal freedom. This idea will be introduced in Chapter 6 and its impact in property law will be developed in Part III. However, before reaching such point, a closer look at the impact of the *numerus clausus* on judges and legislators is needed.

[180] See 8.3.

CHAPTER 5

THE NUMERUS CLAUSUS AND SOURCES OF LEGAL CHANGE

As argued in Chapter 2, assessing the impact of the *numerus clausus* principle in legal change requires accounting for the role of the State in delineating and enforcing property rights. The last chapter concluded that one of the central effects the *numerus clausus* has in the development of property law is the creation of a legislative monopoly that formally precludes the judicial development of property rights. However, considering that one of the most apparent fault lines between civilian and common law systems is their system of legal sources and the methods by which these are handled in the legal process, it cannot simply be assumed that this aspect of the *numerus clausus* has the same significance in Germany and England. This chapter assesses the relevance of the *numerus clausus* within this wider macro-comparative context. Nonetheless, its scope will not be limited to these jurisdictions. As a relevant part of the contemporary research on the *numerus clausus* is from a law & economics perspective, this chapter also discusses some elements of the American common law, particularly by comparing them to England. The need for this is methodological: without this context, it is not possible to accurately assess some of the arguments made to justify the *numerus clausus* that will be discussed in Chapter 6.

Considering that the civil-common law divide is one of the most explored areas in comparative law,[1] this chapter starts by presenting the basic institutional differences between the systems (5.1). Then, it develops on the place of the judge under the German separation of powers principle, the style of German judicial thinking and its implications for the principle of *numerus clausus* (5.2). Afterwards, it analyses the English and the American *stare decisis* doctrine, focusing on the prevailing approach to the role of judges in the process of legal change and its impact in property law (5.3). The chapter concludes (5.4) that, despite belonging to different legal families, the

[1] Ralf Michaels, 'Im Westen nichts Neues? 100 Jahre Pariser Kongreß für Rechtsvergleichung – Gedanken anläßlich einer Jubiläumskonferenz in New Orleans' (2002) 66 Rabels Z 97, 104; Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 Am J Comp L 671, 685.

impact of the *numerus clausus* on judicial discretion in Germany and England is not so different, as in both systems judges are reluctant to openly develop private law, entrusting this task to the legislator. The main implication of this is that in Germany and England the *numerus clausus* requires relatively less justification than in the US. However, this does not make the problem of justification irrelevant in these jurisdictions, but rather shifts it to the deviations from the principle. This will also be addressed in Chapter 6.

5.1. Sources of law: the institutional starting point

From a theoretical perspective, the contemporary interest in the *numerus clausus* has mostly developed around two connected topics: its justification and, to a lesser extent, its implications for the development of property law. In this context, the *numerus clausus* can been described as a 'constitutional'[2] or 'organizational'[3] rule of property law, because it implies an institutional choice in favour of the legislator (and against courts) as the competent authority to develop new property rights. The core of the comparative discussion of the *numerus clausus* has been essentially concerned with discussing the doctrinal aspects of the first question from a micro-comparative perspective: to what extent the civilian version of the principle that restricts the right of private parties to create new types of property rights is comparable to the doctrine that Anglo-American scholars have examined under the same name over the last twenty years. This chapter focusses on the second problem, discussing an issue raised by Bram Akkermans[4] that remains underexplored: to what extent are the civilian and common law versions of the *numerus clausus* principle comparable from a macro-comparative perspective? On the one hand, Akkermans links the more 'stringent' version of the principle found in some civilian systems, including Germany, to the

[2] Bram Akkermans, 'The Numerus Clausus of Property Rights' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 102; Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia 2008) 407.
[3] Teun Struycken, *De Numerus Clausus in Het Goederenrecht* (Kluwer 2007) 350–356, referring to Dutch law.
[4] Akkermans, 'The Numerus Clausus of Property Rights' (n 2) 103; Akkermans, *The Principle of Numerus Clausus in European Property Law* (n 2) 407.

continental doctrine of separation of powers.[5] On the other, he reports that, in common law systems, including England, the judiciary holds the 'prime position' to develop most areas of property law.[6] However, Akkermans does not develop the deeper implications of this for civilian legal reasoning nor how this differs from the Anglo-American approach to the authority of courts. Filling this gap requires stepping back to see the functioning of this principle within the wider context of each tradition. This will lead to some unexpected conclusions, including that (contrary to Akkermans' assumptions) English courts do not have the prime position to develop the property system.

According to comparative scholarship, the sources of law and the legal methods of each tradition are at the core of the civil-common law divide. On the one hand, modern civilian systems are based on the enlightenment idea of having abstract and systematic self-contained codes that anticipate future problems as completely as possible, thereby enforcing a strict separation of powers and preventing judicial law making, which is currently seen as underpinned by a democratic law-making rationale.[7] In the common law, on the other hand, case law is seen as having a central role as courts are not only tasked with solving individual conflicts, but with developing the law 'from below',[8] with statutory law principally serving to flesh out details of case law on specific points or to overturn individual decisions.[9] Even if contemporary comparative scholarship has relativized these differences, highlighting convergence in law-making and legal reasoning across both traditions,[10] while domestic doctrine, at least in England, sees legislation as having a much wider role,[11] the different approach to the sources of law across traditions is still a defining starting point to understand their differences: while the common law is seen as evolving gradually through judicial inductive reasoning, shaped by the rationale of individual decisions that give relevant attention to policy concerns and arguments from economics and other social sciences; the civil law is deemed as essentially made of legislative law, applied in a (more or

[5] Akkermans, 'The Numerus Clausus of Property Rights' (n 2) 103–106.
[6] Akkermans, *The Principle of Numerus Clausus in European Property Law* (n 2) 407.
[7] Mathias Siems, *Comparative Law* (2nd edn, CUP 2018) 52–53; Uwe Kischel, *Comparative Law* (Andrew Hammel tr, OUP 2019) 361, 364–367.
[8] Siems (n 7) 55.
[9] Kischel (n 7) 242.
[10] For an up-dated discussion, see ibid 619–630.
[11] See David Kelly, *Slapper and Kelly's English Legal System* (19th edn, Routledge 2020) 92.

less) positivistic and mechanical manner by judges aiming to interpret statutory law in an impersonal, rational and predictable manner by 'subsuming' individual facts into general rules through the use of syllogisms.[12]

Regardless of the weight of converging trends, due to these different starting points, the institutional choice of the *numerus clausus* in favour of the legislator as the competent authority to develop new property rights cannot simply be assumed to have the same meaning in England and Germany. If the civilian codification was not only an effort to unify and systemize the law of the emerging national States, but a part of a political agenda including a strict separation of the judicial, executive and legislative powers,[13] in principle, the exclusive authority of the legislator in this field seems a necessary consequence of the institutional arrangement in which the modern civilian systems came into existence. By contrast, if case law is the the main source of private law in common law systems, in such traditions, the *numerus clausus* principle seems to remove inherent lawmaking powers from the courts, radically altering the structure of its sources of law. The following sections will discuss these differences by analyzing what the *numerus clausus* implies for the wider context of German, English and American law, focusing on the roles of legislators and of judges, and on the style of their legal reasoning. In other words, I will look at the *numerus clausus* 'beyond property law'.

5.2. Germany: the bounded judge

(a) The dogma of separation of powers

Assessing the significance of the *numerus clausus* within the broader German legal system requires a closer look at how German law understands the role of courts and of the legislator. In civilian systems, the level of freedom and creativity enjoyed by

[12] Siems (n 7) 55–56; Kischel (n 7) 229–232, 361–362, 371–374, 392–397, 412–416.
[13] Jan Smits, *The Making of European Private Law* (Intersentia 2002) 77; Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 89.

judges is a permanent matter of controversy.[14] Even though legislated law (*Gesetz*) is almost always the departure point of private law, the evaluation standards (*Wertungsmaßstäbe*) contained in such statutes can never be complete and need to be laid down by courts in concrete cases,[15] typically by legal interpretation and gap filling. This interaction between law giving and adjudication creates challenges for the civilian idea of separation of powers that are not paralleled in the common law mindset.[16]

Following the political ideas of the Enlightenment,[17] the 19th century codification movement adhered to the basic principle that judges should be strictly bound by legislation.[18] The authors of the codified systems inherited from the monarchs of the 18th century the fear that courts might undermine their efforts to enact the 'law of reason'[19] and, thus, aimed to deny all space for judicial creativity.[20] For this purpose, the absolutist regimes developed the dogma that all conflicts shall be decided by exclusive reliance on statutory law, forbidding all resort to precedents and scholarly opinions.[21] Following this extreme doctrine of separation of powers (*Gewaltenteilung*), civilian judges sought to restrict their creativity to the minimum, claiming that disputes could be resolved by mere 'subsumption' of fact into rules.[22] This institutional arrangement was later transferred to the democratic systems, which see democratically generated law (*i.e.*, statutory law) as a manifestation of the general will of the nation (*allgemieiner Willen des Volkes*), that shall not be altered in any form by an unelected judiciary,[23] and the prohibition of judicial development of the law as a

[14] See Kischel (n 7) 371.
[15] Dieter Schwab and Martin Löhnig, *Einführung in Das Zivilrecht* (20th edn, CF Müller 2016) 38.
[16] Kischel (n 7) 374. For an example, Rolf Wank, *Die Auslegung von Gesetzen* (6th edn, Vahlen 2015) 86.
[17] See Franz Wieacker, *A History of Private Law In Europe with Particular Reference to Germany* (Tony Weir tr, Clarendon 1995) 249–251; RC van Caenegem, *An Historical Introduction to Private Law* (CUP 1992) 115–117, 122–125.
[18] Heinrich Honsell, 'Einleitung Zum BGB' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 90; van Caenegem (n 17) 122, 130.
[19] On the 'law of reason', Wieacker (n 17) 199–275; van Caenegem (n 17) 117–121.
[20] See Honsell (n 18) 90; Schwab and Löhnig (n 15) 38; Zweigert and Kötz (n 13) 89; Kischel (n 7) 375.
[21] Wieacker (n 17) 258, 265; Schwab and Löhnig (n 15) 38; Kischel (n 7) 375.
[22] Zweigert and Kötz (n 13) 89, 90, 258.
[23] Schwab and Löhnig (n 15) 38.

guarantee of citizens' freedom.[24] In contemporary Germany, the civilian conception of separation of powers is embodied at a constitutional level as part of the rule of law in Art. 20(2) GG and, according to Art. 97(1) GG, it implies that judges are bound by legislation (only).[25]

In this wider context, continental scholarship developed methodical rules for legal interpretation which aim to avoid the arbitrary application of statutes by courts.[26] Contemporary German authors directly link these rules to the protection of the separation of powers principle and the rule of law.[27] In Germany, whether these techniques can fulfill this task has become increasingly doubtful and courts have openly recognized their role in the creation of norms.[28] Thus, in practice, '*no civil lawyer believes he is just applying the law in a mechanical and predetermined way*'.[29] In Germany, nowadays, the general picture is that courts not only interpret law, but also fill its gaps and sometimes correct it.[30] Nonetheless, German legal culture still evidences a deep aversion to unwritten law[31] and, as explained below, private law is probably the paradigm of this skeptical approach. This will prove important when addressing the justification of the *numerus clausus* in Chapter 6, as it reveals the place that normative standards and policy arguments have in German legal thinking.

(b) Judicial thinking in German private law

The aversion to judge made law in German private law has clear historical roots. The BGB was drafted at a time in which legislative positivism and the dogma of the complete nature of the law were the leading approaches in German scholarship.[32]

[24] Honsell (n 18) 90.
[25] See Christian Bumke and Andreas Voßkuhle, *Casebook Verfassungsrecht* (8th edn, Mohr Siebeck 2020) 357–358, 597; Wank (n 16) 29, 86.
[26] See Jaap Hage, 'Legal Reasoning' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 531.
[27] E.g., Bernd Rüthers, 'Methodenrealismus in Jurisprudenz Und Justiz' (2006) 61 JZ 53, 53; Wank (n 16) 86.
[28] Schwab and Löhnig (n 15) 43.
[29] Kischel (n 7) 365.
[30] Schwab and Löhnig (n 15) 44.
[31] Kischel (n 7) 364. For a more skeptical view, Rüthers (n 27).
[32] Honsell (n 18) 91.

Savigny's Historical Legal School (*Historische Rechtsschule*), which dominated German legal thinking through most of the 19th century,[33] argued that legal sciences should come exclusively from the Spirit of the People (*Volksgeist*), which he identified with classical Roman Law.[34] Thus, despite being opposed to codified law and more open to acknowledging some role of the judge, the Historical School was reluctant to admit a judicial power to develop the law outside this framework.[35] Under this influence, when codification came to be accepted after the 1871 German unification,[36] the scholars in charge of drafting the BGB perpetuated the idea that judges do not have power to develop the law.[37]

Soon after, the strict positivist view of the drafters of the BGB came under attack, especially by the Free Law Movement (*Freirechtsbewegung*).[38] One of is central aims was to show that even the most carefully drafted code has countless gaps, arguing in favour of broad judicial freedom to fill them.[39] However, the movement was shut down by the rise of Nazism, managing only to discredit the most extreme trends of legal formalism.[40] According to mainstream doctrine, this discussion ended by placing the creative powers of the judge somewhere in between both approaches, but clearly closer to the classic positivist paradigm. In this line, the dominating opinion in contemporary German private law is that judges are primarily subject to legislation, either by its text (*Wortlaut*) or its sense (*Sinn*). Only when there is no rule, judges can resort to customary law (*Gewohnheitsrecht*) and, if all fails, they should decide according to the rule that the legislator would have given to the case at hand.[41] Nonetheless, even when intentionally establishing new legal principles that can then

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[33] For a brief explanation, Nigel Foster and Satish Sule, *German Legal System and Law* (4th edn, OUP 2010) 27–29; for an extensive account, Wieacker (n 17) 279–362.
[34] Friedrich Carl von Savigny, *Vom Beruf Unserer Zeit Für Gesetzgebung Und Rechtswissenschaft* (Mohr und Zimmer, 1814).
[35] Honsell (n 18) 91.
[36] See ibid 2–7; Wieacker (n 17) 375–376.
[37] Kristoffel Grechenig and Martin Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism' (2008) 1 Hastings Int'l & Comp L Rev 295, 345.
[38] In comparative law, the Free Law movement has been presented as a German version of American Legal Realism. See ibid 308, 348–350.
[39] Honsell (n 18) 91.
[40] Grechenig and Gelter (n 37) 348, 349.
[41] Honsell (n 18) 91. In the same line Hans Brox and Wolf-Dietrich Walker, *Allgemeiner Teil Des BGB* (36th edn, Vahlen 2012) 33–36.

be generalized, judges almost universally avoid describing themselves as creators of law.[42]

The way in which German judges have understood their function over time is apparent in the evolution of the 'Theory of the Juridical Method' (*Juristische Methode*).[43] According to Karl Larenz's classic work in this field,[44] and its later updates by Claus-Wilhelm Canaris,[45] the BGB was created in a time dominated by the view that all legal decisions statements could be logically deduced from concepts (*Begriffe*) contained in a closed and complete system by simply bringing the facts of the case under a general rule laid down *ex ante* by the law, [46] in a process called 'subsumption' (*Subsumtion*).[47] Because in this method legal consequences result from concepts, this doctrine came to be known as 'Conceptual Jurisprudence' (*Begriffsjurisprudenz*)[48] and, despite being proven an illusion,[49] its legacy still plays an essential role in German legal thinking.[50]

The inability of Conceptual Jurisprudence to deal with the ambiguity of language and unforeseen problems soon triggered judicial decisions leading to new legal developments.[51] Beside the Free Law School, shortly after the entering into force of the BGB, the 'Interest Jurisprudence' (*Interessenjurisprudenz*) advanced by Philip von Heck[52] argued that the juridical method should not be based on deducing logical outcomes from abstract concepts, but on understanding legal rules as purpose-oriented solutions (*zweckbestimmte Lösungen*).[53] By the mid-20th century this

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[42] Kischel (n 7) 373.
[43] A theory of the application of the law (*Lehre der Rechtsanwendung*) developed by legal theory and legal doctrine. Honsell (n 18) 52.
[44] Karl Larenz, *Methodenlehre Der Rechtswissenschaft* (6th edn, Springer 1991).
[45] Karl Larenz and Claus-Wilhelm Canaris, *Methodenslehre Der Rechtswissenschaft* (3rd edn, Springer 1996). For simplicity, I occasionally follow a later edition of Larenz's textbook on the General Part of the BGB.
[46] See ibid 91–98; Larenz (n 44) 36–86.
[47] Basically, an Aristotelian deductive reasoning based in syllogisms. Honsell (n 18) 52.
[48] Karl Larenz and Manfred Wolf, *Allgemeiner Teil Des Bürgerlichen Rechts* (9th edn, Beck 2004) 73.
[49] ibid; Schwab and Löhnig (n 15) 38.
[50] Larenz and Wolf (n 48) 73; Honsell (n 18) 52. For example, standard textbooks present the 'subusumption' paradigm as the primary approach to legal application. E.g., Brox and Walker (n 41) 29–33.
[51] Larenz and Wolf (n 48) 74. The most famous is probably the doctrine of the disturbance of the basis of the contract developed during the hyperinflation of 1923 (*Störung der Geschäftsgrundlage*).
[52] See Philip Heck, 'Gesetzesauslegung Und Interessenjurisprudenz' (1914) 112 AcP 1.
[53] Larenz and Wolf (n 48) 74.

approach was supplemented by the, so called, 'Jurisprudence of Value Judgments' (*Wertungsjurisprudenz*), which brought the values promoted by the purpose of the law to the foreground, including a view of private law underpinned by an ideal of ethical personalism and, more generally, the respect of the fundamental rights contained in the GG.[54] According to Larenz, both approaches form the basis of the juridical method prevailing in contemporary Germany,[55] and legal theorists often find it difficult to distinguish between them, because both approaches still share great confidence in the ability of positive law to bind the judge, either by systematic thinking or by resorting to the order of values established in the law and the constitution.[56]

This trend was paralleled by an effort of constitutional doctrine to bring more clarity to the role of judges in the development of the law.[57] As said, Art. 97(1) GG upholds the classic civilian separation of powers principle by stating that judges are bound by legislation only, but Art. 20(3) GG has a slightly different wording, stating that the exercise of jurisdiction (*Rechtsprechung*) is subject to '*Recht und Gesetz'*. This expression cannot be translated into English without losing its grasp.[58] The word '*Recht*' has no equivalent in English, as it embodies, at the same time, the idea of law and of justice or correctness, while '*Gesetz'* is literally only legislative law.[59] In German scholarship, the later provision is normally understood as holding that it is not enough for judges to follow the formal content of the law (in the sense of *Gesetz*), as they are also bound by a substantive idea of justice, derived from a natural law ideal. This reading of the constitution is frequently seen as embodying the 'Radbruch formula',[60] as a reaction to the acritical enforcement of Nazi law by the German judiciary in the 1930s and 40s.[61]

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[54] ibid 75, 76.
[55] Larenz (n 44) 120. *Kommentare* also speak of a restricted Jurisprudence of Value Judgments, e.g., Christian Grüneber, 'Einleitung', *Palandt. Bürgerlicher Gesetzbuch mit Nebengesetzten* (80th edn, Beck 2021) 8.
[56] Grechenig and Gelter (n 37) 353–355.
[57] See Wank (n 16) 86.
[58] On this topic, see Kischel (n 7) 362–363.
[59] This idea is lost in the English version of the GG made available by the German government, which translates the passage as 'legislation and the law', https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0111.
[60] See Gustav Radbruch, 'Gesetzliches Unrecht Und Übergesetzliches Recht' (1946) 1 SJZ 105.
[61] Honsell (n 18) 92.

Contemporary German constitutional doctrine[62] and theory of the juridical method[63] seem to widely accept that judges are allowed to develop the law to fill gaps in legislation, especially to bring old statutes in step with changing social realities. This view has been endorsed by the BVerfG, holding that Art. 20(3) GG authorizes judges to fill gaps in the law (*Lückenfüllung*) and extend it (*Rechtsfortbildung*).[64] A 2011 decision of the BVerfG also established clear limits to such power.[65] According to this ruling, *Rechtsfortbildung* does not allow judges to replace the justice conception laid down by the legislator with their own. This does not preclude the judicial development of the law: considering the accelerated change in social relations, the limited capability of the legislators to react to new realities and the existence of open-ended legal provisions, judges have the task of adapting the law in force to new circumstances. Nonetheless, this power has clear boundaries: judges cannot free themselves from the 'sense and purpose' (*Sinn and Zweck*) of the law. They must respect the basic decision made by the legislator, implementing the legislative will under the new circumstances:[66] courts cannot appropriate the role of the legislature by imposing their own policy choices.[67]

The evolution of the German juridical method might suggest that German courts have acquired a relatively broad power to develop private law over the 20th century, somehow diluting the restrictive impact of the *numerus clausus* in judicial law making. Nonetheless, despite the fact that the subsumption paradigm of the *Begriffjurisprudenz* has long being known to be an illusion, German courts are still seen as being under the duty to capture the binding decision made by the lawgiver and fully apply it to solve the dispute at hand.[68] From the perspective of the juridical method, Interests Jurisprudence aims to enforce the purpose objectively laid down by the legislator in the statute itself, while Value Judgment Jurisprudence requires judges to resort to the

[62] See Bumke and Voßkuhle (n 25) 366.
[63] See Rüthers (n 27) 59; Wank (n 16) 35, 83–86.
[64] BVerfGE 34, 269, 287.
[65] Honsell (n 18) 93.
[66] BVerfGE 128, 193, NJW 2011 836.
[67] Bumke and Voßkuhle (n 25) 366.
[68] Schwab and Löhnig (n 15) 39.

values embodied in the wider legal system.[69] As a result, the main gateways for judicial creativity in private law are narrowed by the need to conform to the political choices either implied in statutory law[70] or resulting from the value system embedded in the fundamental rights laid down by the GG (*Grundrechte als Wertordnung*).[71] Even when judges are not able to interpret the law in accordance with the constitution,[72] they are not expected to change the law themselves, but to refer the problems to the BVerfG (Art. 100 GG; §§ 80 ff BVerfGG).[73] Accordingly, deviations from legislative intent have been subject to heavy criticisms by authors arguing that a relaxation in the use of the judicial method risks converting Germany into an '*oligarchical judicial State*'.[74] This might explain why, despite the existence of certain flexibility, judges are reluctant to openly develop the property system and prefer to work, as much as possible, within the forms already provided by the law.

The relation between separation of powers and judicial development of the law achieves its maximal level of tension in the doctrine of *Rechtsfortbildung* (extension of the law) and the elusive concept of *Richterrecht* (judge-made law). According to recent commentary literature, *Richterrecht* encompasses all decisions that explicitly or implicitly contain rules that do not correspond to the mere repetition of the abstract rules laid down in statutory law, with some authors distinguishing between immanent (*gesetzimmanent*), constructive (*gesetzübersteigend*) judge-made law,[75] and illegitimate judge-made law.[76] Since the fall of Conceptual Jurisprudence, there is a general agreement that judges can 'extend the law' to fill gaps,[77] but that this power is subject to heavy doctrinal constraints. To start, the concept of 'a gap' (*Lücke*) is restricted. It is not enough that the law is silent on a given issue: there must be an 'unplanned gap in the statute' (*planwidrige Unvollständigkeit des Gesetzes*).[78] Thus,

[69] Larenz and Wolf (n 48) 75, 76.
[70] See Schwab and Löhnig (n 15) 39, 43; Wank (n 16) 85–86.
[71] Larenz and Wolf (n 48) 86–90; Schwab and Löhnig (n 15) 44; Honsell (n 18) 69–88.
[72] Honsell (n 18) 69–88.
[73] Brox and Walker (n 41) 30.
[74] E.g., Rüthers (n 27) 60, my translation.
[75] Honsell (n 18) 89, 90.
[76] Stefan Vogenauer, 'Statutory Interpretation' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 835.
[77] Grüneber (n 55) 10.
[78] Larenz and Canaris (n 45) 191, 194; Grüneber (n 55) 10.

for example, the absence of a provision allowing for ownership of separate parts of buildings in the BGB is not such a gap and, thus, could not possibly be overcome by *Rechtsfortbildung*.[79] That is why flat-ownership had to be created by a special act, the WEG.[80] Only if a proper gap is identified by using the regular interpretation elements of the juridical method, judges might fill it by 'extending the law'. In this process the judge must first resort to the original plan of the legislator 'immanent' in the statute. If this fails, the judge can fill the gap by constructive extension of the law, that does not rely on the original intention of the legislator, but is still governed by and must result from the general principles of the legal system.[81] Thus, when extending the law, judges are bound by the legislative intention. Judicial extension that contradicts the text of statute, has no grounding in it, or is at least, not indirectly allowed by it, amounts to a violation of Art. 20(3) GG.[82]

Following Larenz and Wolf,[83] in practice, this implies that courts sometimes deviate from statutory law, either because the purpose (*Zweck*) of the law does not match its text (*Wortlaut*) or because, since the enactment of the law, the development of social life and the prevailing views on the law have created new rules. In order to align the text of the law and its purpose, immanent extension allows the judge to fill a gap by extending a rule by analogy to a case not covered by the meaning of the text (*Analogie*) or by excluding from its scope cases that are not covered by its purpose (*teleologische Reduktion*).[84] By contrast, constructive judge-made law corresponds to rules developed by courts, either with no statutory support to fill a gap (*praeter legem*) or against a statute (*contra legem*). Such developments can be justified by the inevitable needs of legal affairs (*Rechtsverkehr*), 'the nature of things' or the overriding effect of a legal-ethical principle, such as good faith or a constitutional right.[85] Due to this certain relaxation of the subsumption paradigm, German judicial reasoning has opened itself to a (limited) level of consequentialism. However, when doing this, judges remain

[79] Larenz and Canaris (n 45) 191, 194, 196.
[80] See 8.3
[81] For all the process, Larenz and Canaris (n 45) 187–190.
[82] Grüneber (n 55) 10.
[83] Larenz and Wolf (n 48) 93–96.
[84] Other textbooks use different terminology. For example, Brox and Walker (n 41) 36–38.
[85] Larenz and Wolf (n 48) 95, 221–222.

bounded by legislation, as they can only rely on the consequences intended by the legislator, either by the relevant statute or the legal system in general, especially, by the values laid down in the Constitution.[86]

(c) Impact in property law

Despite enjoying only a limited discretion to develop the law, German judges are still credited with having successfully sought to adapt the '*positivist and slightly anachronist nature of the BGB*' to new economic and social realities, especially after 1951.[87] Within this broad context, it is now openly acknowledged that the German judiciary has developed a number of private law doctrines with no statutory support via constructive extension.[88] Some of these doctrines were later included in the BGB by the 2002 general reform of the law of obligations,[89] while others remain without positive regulation.[90] However, due to the persistent ideal that, in principle, courts should not develop private law, these doctrines are normally not openly presented as judicial creations, but as conceptually derived from positive law.[91] This is especially apparent in the field of property law, where courts have avoided describing the anticipation right of the buyer[92] and the ownership for security purpose[93] as judicially created property rights. The approach underpinning these decisions is well reflected in a recent ruling of the BGH, holding that the '*creation of private burdens not acknowledged by the numerus clausus of property law cannot succeed by means of Rechtsfortbildung* [extension of the law]'.[94] As a consequence, it is not always

[86] ibid 77–79, 88.
[87] Wieacker (n 17) 409, 416.
[88] Larenz and Wolf (n 48) 95.
[89] E.g., the doctrines of the disturbance of the foundation of the transaction (*Störung der Geschäftsgrundlage),* of *culpa in contrahendo* and of positive breach of contract (*positive Vertragverletzung*).
[90] E.g. the doctrines of apparent power of attorney (*Anscheinsvollmacht*) and of the abusive exercise of a right (*unzulässige Rechtsausübung*). Larenz and Wolf (n 48) 74.
[91] See Simon Whittaker and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Land Scape' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000) 20–21, discussing the doctrine of the disturbance of the foundation of the transaction.
[92] The BGH has held that this is not a property right and it cannot be asserted against everyone, but it still is a very strong right and a step prior to full ownership, BGHZ 30, 374, 377.
[93] See Jan Wilhelm, *Sachenrecht* (5th edn, De Gruyter 2016) 12; Marina Wellenhofer, *Sachenrecht* (34th edn, Beck 2019) 17–18. For discussion, 4.2(b).
[94] BGH 13.9.2013. NJW 2013, 3515, 3518.

apparent when a doctrine qualifies as judge-made law and, if so, whether it is the result of immanent or constructive extension of the law. However, the anticipation right, has been described by Larenz as a case of *praeter legem* constructive legal extension,[95] while Wiegand has seen the development of ownership for security purposes as an open infraction of the *numerus clausus*.[96]

Due to the strong allegiance to statutory law inbuilt in the German juridical method, judicial extensions of the law are normally fitted into the existing legal categories. In this line, as a result of the deductive style that the modern juridical method inherited from Conceptual Jurisprudence, German judicial developments of private law have an inherent tendency to work inside the pre-existing modules of private law. In the law of obligations, this has frequently worked through the 'escape to the open legal provisions' (*Flucht in die Generalklauseln*),[97] especially the duty to perform contracts in good faith (§ 242 BGB).[98] Property law lacks these open-ended legal provisions, forcing judicial creativity to operate within its pre-existing modules. However, as shown in Chapter 8.3 by discussing the problem of the 'eternal' land servitude in German law, these modules provide for a level of freedom sufficient to allow judges and private parties to partially adapt the existing property rights to new circumstances without breaching the *numerus clausus*.

Nonetheless, the overall relevance of judge-made law in German property law should not be overplayed. According to legal historian Franz Wieaker, the formal structure of the BGB imposes strong limits to what even a modern court can achieve.[99] Despite scholarship frequently highlighting the impact that the constitutional concept of ownership[100] and public law reforms[101] had in modernizing German property law (see 3.2), changes that implied a clear break with the original property rights of the BGB

[95] Larenz and Wolf (n 48) 95.
[96] Wolfgang Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (1990) 1/2 AcP 112, 128.
[97] Honsell (n 18) 31.
[98] E.g., see previous footnotes on the fall of the basis of the contract.
[99] Wieacker (n 17) 419.
[100] E.g., Friedrich Quack, *Münchener Kommentar Zum Bürgerlichen Gesetzbuch. Sachenrecht*, vol 6 (Friedrich Quack ed, 3rd edn, Beck 1997) 3, 18–19.
[101] E.g., Wieacker (n 17) 431.

have been achieved by legislative reforms. For example, as discussed in Chapter 8.3, the strong 'accession principle' established in §§ 94(1) and 93 BGB, which provides for the unity of land and building in a single module of ownership could only be broken by the legislative expansion of the superficies right in 1919[102] and, more radically, by the legislative creation of 'flat ownership' in 1951.[103]

The increased flexibility of the German Juridical Method over the 20th century should not lead to the conclusion that German judges have a massive power to update private law and, especially, the property system. Despite their importance, private law doctrines developed by judge-made law are relatively few and almost all of them fall within the law of obligations.[104] These innovations were almost never presented by courts as freely created doctrines but were disguised as logical conclusions from positive law and were frequently criticized by their contemporaries as judicial usurpations of legislative powers.[105] Thus, despite the modern acknowledgment that judicial reasoning cannot be purely mechanical, it is clear that, within the distributions of law-making competences of the German legal systems, the legislator is the one primarily called to develop private law, with courts having only a residual and limited role.[106] Nowhere in German private law is this clearer than in property law. In this context, the main impact of the *numerus clausus* seems to be the imposition of stringent doctrinal constraints on the identifications of gaps: if a property right does not exist, in principle, this should not be regarded as a gap, precluding the creation of a new property type through *Rechtsfortbildung*. Beyond that, the *numerus clausus* principle does not seem to take any further powers away from German courts.

This has relevant implications for both the comparative and the theoretical understanding of the doctrine of *numerus clausus*. In German law the *numerus clausus* should be seen as a doctrine that has the limitation of party autonomy as its primary concern, not the limitation of judicial power. The main theoretical consequence

[102] See ErbbauVO, now ErbbauRG.
[103] See WEG.
[104] See previous notes.
[105] See n 91.
[106] For example, the development of the doctrine mentioned in the previous footnote has been attributed to the passiveness of the *Reichstag*. ibid 21.

of this is that the justification of the German *numerus clausus* is not problematic and should emerge from the (internal) system of the BGB, the practical goals pursued by it and the values underpinning German private law. By the same token, what demands a special explanation in German law is not that courts are denied the power to create new property rights, but the fact that they have (in rare cases) actually infringed this prohibition.

5.3. England and the US: divergent views on the role of judges

(a) The impact of *stare decisis* on the *numerus clausus*

In common law systems the *numerus clausus* operates in a different institutional context. As in civilian systems, the primary function of common law courts is solving disputes under the existing standards of society.[107] However, in contrast to the civilian separation of powers principle, the *stare decisis* doctrine is said to invests common law judges with an inherent authority to create and develop new legal rules, subject to legislative revision.[108] Thus, in principle, in Anglo-American legal systems, developing the common law is within the province of the courts.[109] This is specially the case in private law, which in England and the US is still broadly made-up of case law, especially in the areas of contracts and torts.[110] As a result, in common law systems, the acknowledgment of a *numerus clausus* of property rights seems to have a deep impact on the basic division of powers between judges and legislators: it takes away from courts the authority to develop a part of private law, placing it under the exclusive power of the legislator. This institutional impact of the *numerus clausus* principle in the law-making status of courts might explain why contemporary Anglo-American scholarship shows more interest than its German counterpart in providing a justification for the principle. Nonetheless, despite being frequently treated together in

[107] Melvin Eisenberg, *The Nature of the Common Law* (Harvard UP 1988) 4.
[108] Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale LJ 1, 10.
[109] Eisenberg (n 107) 1.
[110] Merrill and Smith (n 108) 10.

comparative studies, there is also great variation between the English and the American common law[111] that needs to be addressed.

Despite scholarship frequently highlighting convergence across traditions,[112] common law systems are still normally characterized by the importance of case law, the doctrine of *stare decisis*, the weaker role of statutory law and the less prominent place of academic literature. From this perspective, the main characteristic of common law legal systems is said to be that they are made by judicial decision-making.[113] However, the historical origin of the common law rested in the opposite idea: *stare decisis* was founded in the view that judges did not make law, but only 'declared' it.[114] Indeed, for a long time, judges were said to merely 'discover' the basic principle of the common law,[115] grounded in immemorial custom.[116]

This does not mean that legislation had a prominent role. In contrast to the growing importance that legislation acquired in Europe during the age of the 'law of reason', in England the role of legislation, especially in private law, remained marginal.[117] This only started to change during the 'Age of Reform', due to some procedural reforms[118] and the incorporation of a formal principle of judicial independence.[119] Pushed by Bentham's utilitarian views regarding the rationalization of the law,[120] during the 1830s the historical English writ system was brought to an end,[121] allowing the emergence of a 'substantive common law'.[122] Because the scope of the old writs was limited and judges were now 'deciding cases on the merits', they started developing the law.[123] Since these judges were also fiercely independent, by the mid 19th century they were

111 Kischel (n 7) 333, 336, 344–348; Zweigert and Kötz (n 13) 243–249, 259–265; Siems (n 7) 75–78.
112 For an up-dated discussion, see Kischel (n 7) 619–630.
113 See ibid 228–242; Siems (n 7) 52–57.
114 Richard Ward, Amanda Wragg and RJ Walker, *Walker & Walker's English Legal System* (10th ed., OUP 2008) 78.
115 ibid; Martin Partington, *Introduction to the English Legal System: 2018-19* (OUP 2018) 48-49.
116 Merrill and Smith (n 108) 10.
117 van Caenegem (n 17) 135–136.
118 H Patrick Glenn, *Legal Traditions of the World* (5th edn, OUP 2014) 254–257; Zweigert and Kötz (n 13) 197.
119 Glenn (n 118) 256–257.
120 See van Caenegem (n 17) 137-138,162.
121 John Baker, *Introduction to English Legal History* (5th edn, OUP 2019) 60.
122 Glenn (n 118) 254, 255. For a brief account of the reforms, van Caenegem (n 17) 162–165.
123 Glenn (n 118) 255.

actually making law,[124] even though this might not have been acknowledged until much later. This phenomenon is well captured in comparing the opinion delivered by Lord Parke in a 1830s holding that '*the common law system consists in applying (…) those rules of law which derive from legal principles and judicial precedents (…) and we are not at liberty to reject them*',[125] with a famous speech held by Lord Reid in the early 1970s, acknowledging that view was '*a fairy tale*' that cannot longer be believed.[126]

Over the last decades, the English common law has come to accept the idea that judicial activity is inherently creative.[127] To a large extent this seems to result from the many conclusive arguments that militate against the declaratory view of the law. First, due to the impossibility of infinite regress, all rules have an origin: at some point a court must have made the rule. [128] Second, the judicial establishment of legal rules would occur even if the sole function was to resolve disputes on the base of existing rules: if the courts are to explicate the application, meaning and implication of the society's existing standards in a new situation, they cannot at the same time by prohibited from formulating rules they have not previously announced. Modern societies are in continuous change, creating continuous need for new legal rules to resolve unprecedented issues. Because of the inevitability of change, the application of an old rule to a new case may constitute a new rule. Moreover, even when no social change is involved, old rules sometimes need to be discarded because they were wrongly established. Hence, common law courts have an inevitable secondary function of enriching the supply of legal rules.[129] This law-making power cannot be derived from any theory of representative democracy, at least as long as judges are not elected. Thus, in England, the legitimacy of courts to develop the common law is closely tied to a doctrine of separation of powers that sees in the independence of courts a form

[124] ibid 257, 258.
[125] *Mirehouse v Rennell* (1833) 6 ER 1015 (HL) 1023.
[126] Lord Reid, 'The Judge as Law Maker' (1972) 12 JALT (New Series) 22, 22.
[127] See Geoffrey Samuel, 'Common Law' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 175–176.
[128] Kelly (n 11) 183–184.
[129] Eisenberg (n 107) 4–5.

of preventing dictatorial powers from being asserted by any one branch of government.[130]

At any rate, the original idea of *stare decisis* as a process of discovering the law provided the common law with an inductive-deductive judicial reasoning that seems to stand in contradiction with the nominally deductive style of the German Juridical Method:[131] in the common law, the judge seeks to induce a rule from a previous decision to later apply it deductively to the case at hand, giving a key importance to the *justification* of the rule. In this scheme, the rules abstracted from the individual cases are necessarily broader than the rules applied, as otherwise such rules could not be applied to different facts. Therefore, this inductive process cannot be strictly logical and irrefutable.[132]

Due to the central place that case law enjoys in common law systems, comparative research normally describes the role of statutory law as remedial or secondary, arguing that English courts have historically resisted the power of Parliament[133] and seen statutes as necessary evils that disturb the harmony of the common law.[134] In this line, despite the unique supremacy that Parliament enjoys under the British constitution, courts have always managed to retain the power to interpret the law. For example, until recently, English judges did not admit, in any form, parliamentary debates in aid to legal interpretation.[135] Thus, comparative research reports that to confine the power of judges, English statutes are drafted in highly technical, detailed and often opaque terms, which are alien to civilian lawyers.[136]

Despite sharing the same basic systems of legal sources, the law-making powers of English and American judges are different. Due to their differing understanding of *stare*

[130] Partington (n 115) 49.
[131] Zweigert and Kötz (n 13) 69–71; Samuel (n 127) 174.
[132] For an analysis in a comparative context, Kischel (n 7) 229–232.
[133] ibid 242–243.
[134] Zweigert and Kötz (n 13) 265.
[135] See *Pepper v Hart* [1993] AC 593, allowing resort to Hansard in certain cases.
[136] Kischel (n 7) 243; Samuel (n 127) 178; Zweigert and Kötz (n 13) 267.

decisis,[137] and the unique power of the US Supreme Court,[138] American courts generally play a much more decisive role in the process of legal change than English judges,[139] who are much more willing to defer major legal reforms to the legislator.[140] In addition, in the US this view has been intensified by the law & economics movement, which is sceptical as to the quality of statutory law, favouring the common law as a more efficient source of legal change.[141] This already points to an important difference between the status of the *numerus clausus* in England and the US: in the former the *numerus clausus* has been acknowledged by Parliament as part of a major, encompassing and much appreciated reform of land law,[142] while in the latter it normally continues to be seen as a norm of judicial self-restraint.[143] A proper assessment of this divergence requires closer attention to the differences in English and American legal reasoning and its impact in property law.

(b) English judicial reasoning and its impact in property law

The way in which English judges exercise their power to change the law is regarded as much more circumscribed than that of American courts.[144] This is largely an outcome of English law adhering to a much stricter and formal doctrine of *stare decisis*.[145] Following an old practice established during the 19th century and reaffirmed in *London Street Tramways Co Ltd v London County Council*,[146] for most of the 20th century, the House of Lords held that it was bound by its own precedents and that reforms of the law were for Parliament.[147] This situation partially changed with the 1966 Practice Statement by which the House of Lords announced that it would, from

[137] PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law* (Clarendon Press 1987) 116, 117.
[138] See Kischel (n 7) 338.
[139] Atiyah and Summers (n 137) 134.
[140] ibid 141, 142; Ward, Wragg and Walker (n 114) 5.
[141] See Richard A Posner, *Economic Analysis of Law* (7th edn, Aspen 2007) 249–253, 562–565.
[142] See AH Manchester, *A Modern Legal History of England and Wales, 1750-1950* (Butterworth 1980) 324–325.
[143] See Merrill and Smith (n 108) 9.
[144] For a general comparative view, see Atiyah and Summers (n 137) 115–156; Kischel (n 7) 333–348.
[145] Atiyah and Summers (n 137) 116–117.
[146] *London Tramways Co v London County Council* [1898] AC 375.
[147] Kelly (n 11) 153.

then on, depart from a previous decision when it appears right to do so.[148] However, the statement also made clear that the House would continue treating former decisions as normally binding and that it would bear in mind the danger of retrospectively disturbing the basis on which contracts and property settlements were entered into. In this line, the use of this prerogative by the House of Lords (now Supreme Court) has normally been very restrictive,[149] while the Court of Appeal is still generally forbidden from departing from its own precedent in civil cases.[150] Thus, even after 1966, the power of English courts to disregard their own precedents is seen as much weaker than that of American courts.[151]

Consistent with this general approach to the law-making process, in the field of property law, the Supreme Court,[152] like the House of Lords before it,[153] tends to defer pressing problems to Parliament. A good example is the reluctance of the House of Lords to change the rule requiring leases to be for a defined term of years in order to be recognized as property interests, despite Lord Browne-Wilkinson holding it to be an '*ancient and technical'* rule that produces a '*bizarre outcome*' and has no '*satisfactory rationale*' nor '*useful purpose*', expressing the '*hope that the Law Commission might look at the subject to see whether there is in fact any good reason now for maintaining a rule which operates to defeat contractually agreed arrangements*'.[154] This judicial deference to Parliament is mirrored by the comparative appraisal of English legal thinking, which has been described as far more positivistic, formal and centred in black letter rules than the American.[155] Thus, like the German juridical method, the style of English legal reasoning has been held to be more 'internal' to the law than the American.[156] Richard Posner has even argued that, in this

[148] [1966] 1 W.L.R. 1234
[149] Atiyah and Summers (n 137) 139; Kischel (n 7) 241.
[150] *Davis v Johnson* [1979] AC 264, HL. The Court of Appeal can only depart from its own precedents cases in the cases laid down in *Young v Bristol Aeroplane Company Limited* ([1944] 1 KB 718) and in other specific cases, as when previous law conflicts with the HRA 1998.
[151] Atiyah and Summers (n 137) 120–122.
[152] E.g., *Arnold v Britton* [2015] 2 WLR 1593, as discussed by Sarah Blandy, Susan Bright and Sarah Nield, 'The Dynamics of Enduring Property Relationships in Land' (2018) 81 MLR 85, 105.
[153] E.g., overruling Lord Denning's analysis in *National Provincial Bank v Ainsworth* [1964] Ch 665 (CA); [1965] AC 1175 (HL).
[154] *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, 396.
[155] Kischel (n 7) 333, 347–348.
[156] Grechenig and Gelter (n 37) 303.

respect, English law has more in common with continental legal systems than with the American common law.[157]

The English resistance to the judicial development of the law is paralleled by the emergence of Parliament as the dominant force in the British Constitution and legislation becoming the major source of change in English law.[158] As a consequence, in comparative research, the idea of case law being the main source of contemporary English law has recently been held to be a myth.[159] Similar to what happens in civilian systems, there is not much doubt that, in England, major legal reforms are for Parliament, not for judges.[160] Furthermore, in England legislative reforms are also much easier and frequent than in the US.[161] This is apparent in the development of English property law since the mid 19th century, especially, after the 1922-1925 Land Law Reform.[162] Even leaving landlord-tenant law aside, over the last half of a century, Parliament has passed a variety of acts aiming to keep property law in step with society, including the Matrimonial Homes Act 1967, the LP(MP)A 1989, the TOLATA 1996, the Commonhold and Leasehold Reform Act 2002 and the LRA 2002 (itself also subject to further reforms),[163] while the Law Commission has more recently proposed or considered reforms, in fields as the leasehold and commonhold[164] and registration.[165]

In this context, the principle of *numerus clausus* does not seem to imply a major alteration to the way in which modern English law deals with problems of legal change *in general*. Moreover, the embodiment of the principle in the LPA 1925 might be seen as nothing more than a very tangible chapter in the process by which Parliament gradually became the central developer of property law in England. The approach to

[157] Richard A Posner, *Law and Legal Theory in England and America* (OUP 1996) 20.
[158] Ward, Wragg and Walker (n 114) 5; Kelly (n 11) 92.
[159] Samuel (n 127) 178.
[160] On this, see Zweigert and Kötz (n 13) 271.
[161] Atiyah and Summers (n 137) 140–141.
[162] See Manchester (n 142) 304, 310–311; William Cornish and others, *Law and Society in England 1750-1950* (2nd edn, Hart 2019) 135, 168–170.
[163] E.g., Land Registration Act 2002 (Amendment) Order 2008.
[164] See Wendy Wilson and Casie Barton, 'Leasehold and Commonhold Reform' (House of Commons Library 2021) 8047.
[165] Law Com No 380.

the law on covenants is a good example. In the early 1830s, the Commissioners of the Law of Real Property stated that the enforcement of freehold covenants against successors in title should be developed by Equity,[166] while, during the early 21st century the Law Commission held that the recognition of positive covenants as new interests in land should occur through statutory recognition.[167] Thus, as in Germany, in England there might be more need to justify the judicial infringement of the *numerus clausus* principle than its existence.

(c) American judicial reasoning and its impact in property law

The American approach to the judicial power to develop the legal system diverges from the English, making the place of the *numerus clausus* in the US different again. This is not only explained by a weaker doctrine of *stare decisis*,[168] but by the central place policy arguments acquired in American legal reasoning during the 20th century.[169] There has been much discussion on the precise place that policy arguments have in American judicial reasoning. However, following Melvin Eisenberg, at the end, social propositions (*i.e.*, policy concerns) seem to always have some role in the American common law, either in the way that rules are first established by courts or in the way in which those rules are then extended, restricted and applied.[170] Consistently with this view, in comparative law, American legal reasoning is generally perceived as much more policy oriented than its English equivalent.[171]

In contrast to what happens in England (or Germany), this view is accompanied by the perception that the capacity of legislatures to provide the legal rules needed by society is limited and that much of that capacity is dedicated to governmental matters, such as taxation, administrative rules, definition of crimes or regulated industries, and that, in many fields, the flexible form of judicial precedents is preferable to the canonical

[166] Ben McFarlane, 'Tulk v Moxhay (1848)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart 2012) 212.
[167] See Law Com Consultation Paper No 186 and Elizabeth Cooke, 'To Restate or Not to Restate? Old Wine, New Wineskins, Old Covenants, New Ideas' [2009] Conv 448, 460.
[168] See Atiyah and Summers (n 137) 119–120, 139.
[169] See Zweigert and Kötz (n 13) 246–249.
[170] Eisenberg (n 107) 2–3.
[171] See Hage (n 26) 533–534.

form of legislative rules.[172] In this line, American courts have been described as having an '*inherent policy making authority with respect to private law'*.[173] The law & economics movement has endorsed this view with a strong normative support grounded in seeing common law rules as more efficient than legislative law, due to courts not being subject to the political pressures of interest groups with narrow distributional goals.[174] In property law, the faith American law places in judges for keeping property law in step with social needs is apparent in the approach taken by the 2000 'Restatement (Third) of Property: Servitudes', which replaces traditional (English) doctrines controlling servitudes *ex-ante*, by *ex-post* judicial tests based on open-ended terms, such as denying a covenant proprietary effect if it is illegal, unconstitutional or against public policy.[175]

Considering that, in practice, the general division of authority between courts and legislators in the American common law gives the judiciary a much more relevant and legitimate role in developing private law than in England or Germany, in the US, the presence of a *numerus clausus* might be seen as placing a much greater limitation on the inherent powers of courts. However, it must also be considered that the American version of *numerus clausus* essentially results from judicial self-restraint and not from a straightforward legislative decision, and that the American version of *stare decisis* is also weaker than the English. Probably therefore, the American supporters of the *numerus clausus* have been specially focused on justifying the principle from a policy perspective that is consistent with the idea of courts developing an efficient common law, while English and German scholars have given more importance to explaining the doctrinal underpinning of the principle and uncovering its systemic aspects.

In addition, the unique institutional impact of the *numerus clausus* in the American common law has led to the development of some theories that aim to justify the *numerus clausus* from the perspective of the advantages of legislative law in

172 Eisenberg (n 107) 5.
173 Merrill and Smith (n 108) 10.
174 ibid 60.
175 See Susan French, 'Highlights of the New Restatement (Third) of Property: Servitudes' (2000) 35 Real Prop Prob & Tr J 225.

developing the property system. Merrill and Smith have summarized these features arguing, first, that statutory reforms are easier to identify than common law rules, because the former do not need informational intermediaries to disseminate information. Second, legislation is more universal than common law rules in its application, as judge-made law has an ambiguous domain resulting from only being binding in the jurisdiction of the court. Third, legislators can be more comprehensive in addressing a problem, because courts are limited to specific issues before them and it can take them years to flesh out a doctrine. Fourth, legislation is more stable than common law rules, because the greater costs of the legislative productions of rules allow for fewer reforms. Fifth, statutes have the advantage of always being prospective, avoiding disruptive effects on established reliance interests.[176] Finally, legislation is better in providing implicit compensation as the result of legislators being in a better position than courts to see the overall costs of reforms.[177]

Merrill and Smith also acknowledge that the principle of *numerus clausus* comes with the cost of the risk of legislative inertia, especially if problems have low visibility and highly dispersed costs. Nonetheless, they see these demerits as the flip side of the stability inherent to legislative action and as representing nothing more than the well-known trade off of any legal system between stability and change. For the specific case of property law, they add that the creation of new forms of property might create fewer inducements for rent seeking by interest groups than in other areas of law (e.g., taxes) because they see new forms of property as creating opportunities for the creation of new wealth, but rarely creating wealth itself or redistributing it. Consistent with this rather optimistic view of legislative development of property law, Merrill and Smith also hold that, when it comes to the law in action, the American overall legislative record is not that bad.[178] If this view of the American legal systems is accurate, there are good reasons to assume that these arguments will also hold in jurisdictions that structurally place more weight on legislative legal change than the US, such as England and Germany.

[176] Notably, mentioned by Lord Browne-Wilkinson in *Prudential Assurance* (n 153).
[177] Merrill and Smith (n 108) 61–66.
[178] ibid 66–67.

In the context of the 'Democratic Property' movement,[179] Avihay Dorfman has maintained that the justification for the *numerus clausus* is political, not functional. According to him, the legislative monopoly over the property system is based on the political legitimacy that the democratic process provides legislative law.[180] Despite raising an interesting point, from the perspective of a common law system, it is hard to see why this argument is specific to property law and not a general criticism of the Anglo-American understanding of the role of courts. By contrast, from the viewpoint of civilian systems, it does not add anything new, as the democratic delineation of private law is one of its foundational dogmas.

Despite these views, the legislative monopoly over property law remains controversial. Recently Hanoch Dagan has argued that, except for a limited number of contexts, both technical and legitimacy reasons support the idea that judges are and should be on equal footing with legislators when it comes to developing the property system, as he sees no difference between this field and the rest of private law.[181]

5.4. Concluding remarks

(a) On the *numerus clausus* as a constitutional rule of property law

As suggested by Akkermans, if the *numerus clausus* principle is seen as a 'constitutional rule of property law', views that see this principle as fulfilling broadly the same function across jurisdictions come under a different light. The implications of this go well beyond Akkermans' initial submission, which was essentially motivated by the greater flexibility of the French version of the principle. Once the American case is

[179] See Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94 Cornell L Rev 1009, 1046–1047.
[180] Avihay Dorfman, 'Property and Collective Undertaking: The Principle of Numerus Clausus' (2011) 61 U Toronto L J 467.
[181] Hanoch Dagan, *A Liberal Theory of Property Law* (CUP 2021) 148–161.

brought into the picture and more attention is given to the style of legal reasoning prevailing in each jurisdiction, a far more complex panorama emerges.

In Germany, the 'institutional' or 'systemic' impact of the *numerus clausus* is relatively low. Because Germany follows a strong separation of powers dogma, the denial of judicial powers to create new property rights does not really alter the basic distribution of law-making competences. The principle only entails a doctrinal restriction regarding what can be qualified as a gap under the German juridical method, thereby limiting the scope of *Rechtsfortsbildung*. In line with this, German doctrine does not really feel pressed to provide any special justification for the legislative monopoly created by the principle. As shown in the next chapter, when some justification for the principle is given, it normally relies on considerations that are embedded in the private law system itself. In this context, the most pressing problem is not accounting for the existence of the principle, but for its judicial infringements.

In the US, by contrast, the principle implies a radical alteration of the basic law-making institutional arrangement, as if takes away from courts a part of their inherent power to develop private law. Because the principle does not have clear statutory standing and seem to run against the theory of the efficient common law, in the US, the *numerus clausus* requires much more 'external' normative support. As shown in the next chapter, the core of this justification lies in the inherent efficiency effect of the principle, but other routes outside the rationality of private law have also been explored, including technical and democratic considerations.

In what might seem an unexpected outcome, the English version of the *numerus clausus* principle has an institutional impact that seems closer to Germany than the US. Although England follows a different separation of powers principle, as in Germany, reforms of property law are primarily seen as a matter for Parliament. Therefore, as in Germany, English doctrine tends to justify the principle in elements that can be described as 'internal' to the law. Consistent with this, the main normative challenge for English law is to justify the judicial deviations of the principle, a topic discussed in Chapter 6.

(b) On legal change

According to the basic institutional theory that underpins this dissertation, considering the role of courts and legislator is essential to understand how property rights are delineated and enforced over time. The previous remarks confirm that, across jurisdictions, the *numerus clausus* makes an essential choice in this regard, conferring on legislators a formal monopoly for the development of property law that, in principle, precludes the judicial creation of new property types. The obvious effect of this choice is that it subordinates the development of property law to the political process. This has relevant implications for the way property law interacts with its environment. As argued by Nonet and Selznick in the context of Law & Society, at a certain stage of their development, societies try to control the arbitrary exercise of power by making the application of the law 'autonomous' from the political process. The price societies pay for this is having highly formalized law, that tends to be unresponsive to social demand and inherently dependent on the political process to respond to new circumstances.[182]

In practice, the relevance of the political subordination that the *numerus clausus* imposes on property law depends, at least to a certain extent, on the status that legislative law enjoys in each system. In the US, where legislation is mistrusted and judges are seen as the main and most competent source of legal change in private law, the rigidity that the *numerus clausus* introduces into the property system implies a structural challenge.[183] In contrast, for jurisdictions like England or Germany, where legislators are seen as the main and more legitimate engine of legal change, the *numerus clausus* does not imply a relevant challenge for its basic distribution of law-making competences. Consistent with this view, in modern times, both the British and the German Parliament have passed several acts adapting different aspects of property law to new times.

[182] Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (2nd edn, Transaction Publishers 2001) 53–72.
[183] Confirming this would require research on American state law that is beyond the scope of this dissertation.

Finally, the different systematic impact of the *numerus clausus* across jurisdictions also generates different attitudes towards its justification. In the US, the controversial standing of the principle is reflected in the vivid attempts to justify it from an (external) policy perspective. By contrast, in English and German doctrine, the tendency is to account for the principle on the basis of arguments that can be described as much more 'internal' to the law. These arguments will be the topic of the next chapter.

CHAPTER 6

FUNCTION AND JUSTIFICATION OF THE NUMERUS CLAUSUS

This chapter seeks to achieve a better understanding of the principle of *numerus clausus* by asking why most modern property systems follow such principle and why and when they also breach it. After introducing the distinction between policy and right-based justifications (6.1), it discusses the main utilitarian (6.2) and rights-based (6.3) justifications for the *numerus clausus*. It concludes (6.4) that, in practice, both strands are largely complementary, as each focusses on different aspects of the real-life operation of the principle. This allows me to argue that the *numerus clausus* does not only aim to bring standardization to property law, but a *specific* form of standardization, namely one that provides property law with a stable but flexible internal structure that can accommodate a vast array of changes in social life.

This chapter will not consider arguments related to the political legitimacy and technical advantages of legislative law, as these were discussed in Chapter 5. I will only mention *in passing* the argument that the *numerus clausus* exists to outlaw forms of property that are inconsistent with democratic values, such as slavery and feudal property.[1] There are two main reasons for this: first, since the abolition of census voting rights, the relation between property rights and democracy has lost much of its importance;[2] and, second, as argued below, the effect of the *numerus clausus* in the substantive delineation of property rights is better explained by a liberal aim to preserve the personal freedom of the owner, as such. Third, I will not directly discuss an argument recently made by liberal property scholars holding that the *numerus clausus* is an unjustified limitation to party autonomy,[3] although this chapter militates against that view.

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[1] See Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94 Cornell L Rev 1009; Avihay Dorfman, 'Property and Collective Undertaking: The Principle of Numerus Clausus' (2011) 61 U Toronto L J 467.
[2] Tilo Wesche, 'Demokratie Und Ihr Eigentum' (2014) 62 Dtsch Z Philos 443, 444–445; also see Juanita Roche, 'Constitutional Land Law: Mexfield and the 40-Shilling Freehold' in Warren Barr (ed), *Modern Studies in Property Law* (Hart 2015).
[3] Hanoch Dagan, *A Liberal Theory of Property Law* (CUP 2021) 111–113.

6.1. On the nature of justification

Comparative research on the *numerus clausus* has no developed theoretical framework to assess its different justifications. In general, it broadly argues that the principle is justified by the need to provide certainty and predictability regarding the third-party effects of property rights, the protection of freedom of ownership and the circulation of goods, also acknowledging the existence of a rich policy-oriented discussion in the US.[4] A difficulty in accounting for the normative support of the *numerus clausus* from a comparative perspective is the inconsistent use of certain terminology, especially of what is 'internal' and 'external' in the law. To a large extent, this can be explained by the different role that normative justifications have across legal systems.

(a) The internal-external debate

In Anglo-American scholarship, where the need for justification is normally seen as a response to the law's claim to authority,[5] explaining a legal institution by resorting to its underlying normative support is a common practice. From a comparative perspective this has been explained as an outcome of the inductive method of *stare decisis*:[6] it is not the decision that sets the precedent, but rule of law in which it is founded.[7] Thus, in English law, a decision carries weight only to the extent it rests on justifying grounds.[8] Nonetheless, within Anglo-American legal theory the relevance and nature of this justification remains unsettled: on the one hand, some strands are skeptical about its role (*e.g.*, Legal Realism or Critical Legal Studies), while, on the

[4] E.g., Bram Akkermans, 'The Numerus Clausus of Property Rights' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 104; Sjef van Erp, 'Comparative Property Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1042–1044, 1049–1050.
[5] See Christopher Gray (ed), 'Justifications', *The Philosophy of Law. An Encyclopedia* (Garland Publishing 1999) 469 469; Mark Tebbit, *The Philosophy of Law. An Introduction* (2nd edn, Routledge 2005) 91; William Lucy, 'Adjudication' in Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 222–223.
[6] See Uwe Kischel, *Comparative Law* (Andrew Hammel tr, OUP 2019) 230.
[7] David Kelly, *Slapper and Kelly's English Legal System* (19th edn, Routledge 2020) 176.
[8] John Bell, 'Sources of Law' in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) 23.

other, there is a substantive disagreement about what should count as justification,[9] even among those who are classified as 'non-skeptical'.[10]

In contemporary private law theory this discussion has taken the form of a debate around what is 'internal' and 'external' to the law. What this means is far from clear, but it is generally accepted that it evokes the distinction between understanding private law in its own concepts (what it *is*) and explaining private law on the basis of its purpose (what it *does*).[11] The former seeks to understand private law by evaluating it in terms of the coherence of its immanent morality, while the latter tries to explain private law in terms of criteria that are said to be 'outside law', as efficiency, fairness or some other extra-legal dimension of morality.[12] In this context, especially in the US,[13] contemporary theorists tend to adopt one of two models: the law & economics or the corrective justice approach.[14]

Recently, elements from both approaches have been successfully combined as part of the (mostly) American New Private Law movement, which claims to take conceptual or 'internal' aspects of private law seriously, but without relinquishing the use of elements coming from other 'external' disciplines, including philosophy and economics.[15] In this context, Andrew Gold and Henry Smith maintain that both perspectives could converge on a picture of private law in which locally simple structures scale up to produce more complex ones, which can only be fully accounted for by combining 'inclusive' internal and external perspectives. Their key idea is that legal concepts work as modules that diminish the informational costs of managing the system. According to them, the complexity of private law is better managed at a local level by having legal concepts and doctrines grounded in the immanent morality of private law, while the internal perspective requires us to consider functional

[9] Gray (n 5) 470–471.
[10] See Lucy (n 5) 208–222.
[11] See Andrew S Gold, 'Internal and External Perspectives: On the New Private Law Methodology' in Andrew S Gold and others (eds), *The Oxford Handbook of The New Private Law* (OUP 2021) 4.
[12] Andrew S Gold and Henry E Smith, 'Sizing up Private Law' (2020) 70 U Toronto L J 489, 489–490.
[13] See Gold and Smith (n 12).
[14] Benjamin C Zipursky, 'Philosophy of Private Law' in Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 623.
[15] See John CP Goldberg, 'Introduction: Pragmatism and Private Law' (2012) 125 Harv L Rev 1640, 1663; Gold (n 11).

considerations that explain how the law 'understands itself'.[16] Smith's modular theory discussed in Chapter 1.5 is a good example.

Although some of its elements will be useful to structure the normative arguments available to justify the *numerus clausu*s, New Private Law does not offer a neat conceptual framework for this dissertation. First, it does not have a specific doctrine or methodology. Its single common feature is an elusive 'interest in the internal point of view' of private law, clustering a variety of approaches that tend to either use functional views to explain the concepts of private law or develop 'external views' that also account for conceptual aspects of private law.[17] Thus, the analytical power of the external-internal distinction has been doubted, especially by authors seeing New Private Law as nothing else than another form of functionalism.[18] Second, the ambiguity of the external-internal distinction is exacerbated in comparative law, due to the different standing that the policy arguments have across jurisdictions.[19]

To a large extent, the different but still overlapping meaning that the 'internal' and the 'external' have in comparative law can be explained by the less visible place that normative justifications have in civilian adjudication. As argued in Chapter 5.2, civilian judges are normally not seen as being required to find reasons behind rules nor as having an inherent power to develop the law that needs to be justified.[20] For example, in Germany, as a consequence of the pervasive influence of Hans Kelsen's thinking,[21] normative decisions have traditionally been seen as part of politics and, therefore, as 'external' to adjudication and unsuitable for legal analysis.[22] However, this does not imply that justification is not needed or useful to understand concrete civilian legal institutions. As shown in Chapter 5.2, normative arguments are not absent in German law, but only primarily displaced to the legislative process, still playing a key role in

[16] Gold and Smith (n 12) 501, 506.
[17] See Gold (n 11) 3–4.
[18] E.g., Alan Brudner, *The Unity of the Common Law* (2nd edn, OUP 2013) 352.
[19] See Chapter 5.
[20] See Dieter Schwab and Martin Löhnig, *Einführung in Das Zivilrecht* (20th edn, CF Müller 2016) 38.
[21] See Hans Kelsen, *Reine Rechtslehre. Studienausgabe Der 1. Auflage 1934* (Matthias Jestaedt ed, Mohr Siebeck 2008).
[22] Kristoffel Grechenig and Martin Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism' (2008) 1 Hastings Int'l & Comp L Rev 295, 356–358.

adjudication, due to the deference that continental judges owe to legislative intent. Therefore, understanding the ideological forces that influenced the creation and development of the BGB is normally seen as necessary to understand German private law.[23]

Similarly, the prevailing opinion in comparative law,[24] Anglo-American legal theory,[25] and law & economics[26] is that the style of English legal reasoning is also rather 'internal', as it tends to prioritize doctrinal consistency over policy concerns. Thus, as accounted for in Chapter 5.3, despite being a common law jurisdiction, English legal thinking is also frequently seen as closer to the German than to the American approach.[27] Nonetheless, comparative research also reports that the American policy-oriented style has made some relevant inroads in England.[28] Following this tendency, it is not infrequent for English private law scholarship to address legal problems by opposing the involved doctrinal and policy considerations,[29] which offers a simpler framework to discuss the justification of the *numerus clausus*.

(b) Policy and principle-based arguments

According to Ronald Dworkin, policy arguments justify legal institutions in the advance of some collective good, generally an improvement in some political, economic or social feature, like the greatest aggregate economic benefit.[30] These arguments are normally associated with the utilitarian tradition inaugurated by Jeremy Bentham and

[23] See Karl Larenz and Manfred Wolf, *Allgemeiner Teil Des Bürgerlichen Rechts* (9th edn, Beck 2004) 21; Schwab and Löhnig (n 20) 23.
[24] See Grechenig and Gelter (n 22) 303, 318; Kischel (n 6) 347, 348; Mathias Siems, *Comparative Law* (2nd edn, CUP 2018) 75–78.
[25] HLA Hart, 'American Jurisprudence through English Eyes: The Nightmare and the Nomble Dream', *Essays in Jurisprudence and Philosophy* (OUP 1983).
[26] Richard A Posner, 'The Future of the Law and Economics Movement in Europe' (1997) 17 Int Rev Law & Econ 3, 3–4.
[27] Reinhard Zimmermann, 'Savigny's Legacy': Legal History, Comparative Law, and the Emergence of European Legal Science' (1996) 112 LQR 576, 584.
[28] Grechenig and Gelter (n 22) 303.
[29] See JW Harris, 'Legal Doctrine and Interests in Land' in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence. Third Series* (Clarendon 1987) 168–169.
[30] Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 38, 107, 115–116.

John Stuart Mill.[31] In their view, human actions should be assessed by their ability to advance general welfare.[32] In Bentham's original vision this was at odds with the idea that human beings have natural rights.[33] In its developed version put forward by Mill, it does not deny that individuals have rights, but still argues that such rights are ultimately justified by instrumental reasons.[34] Since the rise of Legal Realism, this view had a distinctive influence on American legal thinking,[35] reaching its high point with the law & economics movement.[36] Explicitly relying on Bentham, its dominant current, normally associated with Posner's economic analysis of law, justifies extensive areas of the law as promoting the efficient allocation of resources,[37] typically in the effect that legal institutions have in lowering transaction costs and internalizing externalities.

In contrast, principle-based arguments are founded on respect for the *rights* of individuals as a requirement of justice, fairness or some other dimension of morality, not on the prosecution of collective goals.[38] This view is normally seen as rooted in Kantian moral philosophy. In Anglo-American legal theory, it has been specially put forward by Dworkin,[39] while in Germany, Kantian-based respect for human dignity is held to be the highest principle of the legal system.[40] Different to utilitarianism, which is grounded in the human ability to experience pleasure and pain,[41] contemporary Kantians, such as Ernest Weinrib, hold that people are morally relevant due to their status as free and independent creatures.[42] This gives each human being a capacity to make choices that are rational in a special sense and deserve to be respected.

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[31] See Jeffrie G Murphy and Jules L Coleman, *Philosophy of Law. An Introduction to Jurisprudence* (Rev ed, Westview Press 1990) 72–75; Tebbit (n 5) 113, 119–121.
[32] Murphy and Coleman (n 31) 72.
[33] Philip Schofield, 'Jeremy Bentham's "Nonsense upon Stilts"' (2003) 15 Utilitas 1.
[34] Murphy and Coleman (n 31) 74, 75; Tebbit (n 5) 120, 121.
[35] See Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 246–249.
[36] Murphy and Coleman (n 31) 33–36; Ernest J Weinrib, *The Idea of Private Law* (Rev ed, OUP 2012) 3.
[37] Richard A Posner, *Economic Analysis of Law* (7th edn, Aspen 2007) 4, 11, 24–26.
[38] Dworkin (n 30) 38–39, 115–116.
[39] Murphy and Coleman (n 31) 81; Tebbit (n 5) 119–123.
[40] Larenz and Wolf (n 23) 21–22.
[41] Jeremy Bentham, *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (JH Burns and HLA Hart eds, OUP 1998) 11; John Stuart Mill, 'Utilitarianism' in JM Robson (ed), *The Collected Works of John Stuart Mill. Essays on Ethics, Religion and Society*, vol X (University of Toronto Press; Routledge & Kegan 1969) 210.
[42] Ernest J Weinrib, 'Ownership, Use, and Exclusivity: The Kantian Approach' (2018) 31 Ratio Juris 123, 128.

Thus, there is something about human beings that makes them uniquely precious ('dignity') and entitles them to a special kind of respect, including the right not to be used without their consent for the benefit of others.[43] In Germany, this view is said to be imbedded in Art. 1 GG.[44]

The opposition of utilitarian and principle-based arguments has a key role in the discussion regarding the justification of private property. The former come in a broad variety of forms and typically purport to show that the total happiness of a society will be greater, that the general welfare will be better served, or that markets will be able to promote productive efficiency and social prosperity, if material resources are owned or controlled by particular individuals. By contrast, right based arguments defend private property by showing how it respects or promotes consideration to people.[45] According to Jeremy Waldron, no modern philopoher has produced a fully developed discussion on this subject on the scale of the historical theories of Locke and Hegel.[46] In a nutshell, Locke justifies private property in a theory that entitles human beings (subject to certain provisos) to have whatever they are able to take from nature by their labour;[47] while Hegel links the normative grounds of private property to its ability to make personal freedom possible.[48] For Weinrib, ownership reflects the legitimacy of the usability of things within a regime of equal reciprocal freedom: since things have no rights, freedom alone governs the connection between the owner and the thing owned. In this view, in a regime of equal and reciprocal freedom, ownership is intrinsic to the legal relation of people through things.[49]

Frequently, utilitarian and principle-based arguments seem to reach the same outcome by different means. This is specially the case of rule-utilitarianism, as this strand relies on the principle of utility to justify rules that give people rights that society

[43] Murphy and Coleman (n 31) 76–79.
[44] See Christian Bumke and Andreas Voßkuhle, *Casebook Verfassungsrecht* (8th edn, Mohr Siebeck 2020) 73–82.
[45] Jeremy Waldron, *The Right to Private Property* (OUP 1988) 3–16, 62, 64–68.
[46] ibid 14–15.
[47] John Locke, 'Second Treatise of Government', *Second Treatise of Government and A Letter Concerning Toleration* (OUP 2016) 16–17.
[48] GWF Hegel, *Grundlinien Der Philosophie Des Rechts* (Meiner 2009) 66–69.
[49] Weinrib (n 42) 131, 138. On Kantian property, also see Arthur Ripstein, 'Property and Sovereignty: How to Tell the Difference' (2017) 18 Theo Inq L 243, 255.

ought to protect, despite the fact such rights might decrease utility in specific cases. However, there is a wide agreement in modern philosophical thinking that there is no deep compatibility between both, as they value rights for different reasons. For rule-utilitarianism, rights are ultimately protected and justified due to their capacity to increase general utility,[50] while principle-based arguments are ultimately based on the respect of individuals, for their own sake.[51] Nonetheless, the ultimate conceptual incompatibility of both strands of thought does not imply that neither rights nor policy arguments are always absolute. A community pursuing more than one goal might have to compromise between both, while rights might also yield in favour of other rights or urgent policy concerns.[52] Moreover, nothing in this view denies the anthropological thesis arguing that the principles of the community will be determined by their goals[53] or *vice versa*. In fact, in the pre-modern tradition, utilitarian and right-based arguments worked hand in hand, as ideal situations were accepted to be limited by practical considerations that long predated the emergence of classic utilitarianism. In property law, the best example is probably Aristotle arguing in favour of private ownership of land based on its ability to avoid quarrels and incentivize people to apply themselves to work on what is their own.[54] In these older views there is no contradiction between rights and policy: once the law has given an entitlement for practical considerations, it cannot be taken away, becoming a right with a content defined by its function.[55] Loosely following these ideas and a rule-utilitarianism reading of Mill's work, this chapter will conclude that, despite their ultimate conceptual incompatibility, when it comes to explaining the *numerus clausus* principle in action, both strands of thought are essentially *complementary*, as each accounts for different aspects of its practical operation. As argued in 6.4(a), this path resembles, but also deviates from the approach taken by authors pertaining to the New Private Law Movement such as Gold and Smith's.[56]

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[50] Murphy and Coleman (n 31) 74–75, 79–80; Tebbit (n 5) 121.
[51] See Dworkin (n 30) 107.
[52] ibid 117.
[53] ibid 119–120.
[54] Aristotle, *The Politics* (Stephen Everson ed, CUP 1988) 25–26 [1263a].
[55] James Gordley, *Foundations of Private Law* (OUP 2006) 11.
[56] Gold and Smith (n 12).

6.2. Utilitarian justifications

(a) The *numerus clausus* in law & economics

In the Anglo-American context, utilitarian justifications of the *numerus clausus* are underpinned by an apparent contradiction between property law and economic theory.[57] Since, according to Coase, freedom of contract is instrumental in efficiently allocating externalities,[58] rules that restrict the right of parties to make contracts in relation to property rights are normally assumed to undermine the maximization of wealth. As a result, utilitarian justifications of the *numerus clausus* are normally based on the identification of some overlooked negative economic impact derived from the free delineation of property rights. The key to most of these theories is the realization that the externalities dealt with by Coase derive from *using* things and that there is a separate group of externalities resulting from *making transactions* over things, which are worsened by the freedom to create property rights.[59]

Despite normally not been formalized in economic terminology, a utilitarian justification for the *numerus clausus* can also be found in contemporary German private law. Such justification normally relies on the historical project of the BGB to convert private law into a 'law of economic traffic' (*Verkehrsrecht*). Over the last decades this view has become the leading justification for the *numerus clausus* in German doctrine. However, different to the American law & economics movement, this approach gives more attention to explaining how this historical legislative goal is embedded in the doctrinal structure of the BGB than to isolating and explaining its precise economic benefits in formal terms. Thus, the German utilitarian approach to the *numerus clausus* is better accounted for in the context of its private law doctrine (see 6.3 (b) below). Hence, this subsection will almost exclusively discuss the justifications provided for the *numerus clausus* in the context of the American law & economics movement.

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[57] See Bernard Rudden, 'Economic Theory v. Property Law: The Numerus Clausus Problem' in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence. Third Series* (Clarendon 1987) 239.
[58] Ronald Coase, 'The Problem of Social Cost' (1960) 3 JLE 1.
[59] See Benito Arruñada, 'Property as Sequential Exchange: The Forgotten Limits of Private Contract' (2017) 4 J Inst Econ 753, 755–756.

The key to understanding this discussion is that it was preceded by the attack of a leading strand of American scholars to what they saw as ancient doctrines undermining freedom of contact for no good reason, in a context in which the *numerus clausus* did not enjoy the standing of a clearly identified doctrine that could be defended. The broad idea that property rights come in fixed forms had been familiar to US lawyers for a long time, but until the end of the 20th century, American scholars had barely discussed the *numerus clausus,* as such. This disconnection between theory and practice led to the lack of an explicit justification for the limitations that property law imposes on the free delineation of property rights.[60] For Richard Epstein, the only social justification to limit the rights of private parties to create whatever interest they need is the protection of strangers to the title, that is, avoiding externalities. He argued that this could be achieved entirely by means of an efficient registration system and the use of the trust, proposing the abolition of all other restraints on alienation. He held that legal limitations on the free delineation of property rights wrongly focus on protecting the free disposition by successors in title, neglecting that that the proper time to assess the value of contractually binding limitations of property rights is when the original owner wants to sell the land. At that moment, conventional restrictions on property might be valuable, for example to develop land, and no restriction of this freedom is justified when there is no externalitiy.[61] Epstein argued that, on the one hand, once a robust registration system is in place, there is no justification for limiting the free creation of property rights, as all the arising externalities could be internalized by a recordation system that serves to give notice: If the seller wants to attach personal covenants to the land, she will also have to accept a reduction in price, making standardization superfluous.[62] On the other hand, he argued that modern trusts law has made the need of restrictions on alienation obsolete by turning

[60] Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale LJ 1, 1, 4–7, 9.
[61] Richard A Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 WashU LQ 667, 668, 703–704, 710, 713–714.
[62] Richard A Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' (1981) 55 S Cal L Rev 1353, 1360.

beneficial interests in land into rights in a fund, thereby lifting restrictions blocking the free allocation of individual assets.[63]

This view only started to be challenged after Bernard Rudden first used the civilian label of the '*numerus clausus'* as part of an effort to explain why most modern legal systems did not allow private parties to freely create new property rights.[64] Besides accounting for legal and philosophical arguments, Rudden mentioned seven different economic reasons.[65] In different manners, all of them highlight the effect of the *numerus clausus* in improving a market economy. Most of these arguments were later developed in sophisticated terms by the American law & economics movements,[66] and all of them share a critical concern for the externalities created by contracting over property rights. Below, they are grouped in (i) antifragmentation, (ii) optimal standardization and (iii) verification for conveyance arguments.

(b) The utilitarian arguments

(i) Antifragmentation

As early as the 17th century, the uncontrolled attachment of obligations to land was perceived as uneconomic, as it jeopardizes its efficient use and its circulation in the market.[67] Thus, the abolition of feudal duties running with the land was seen as a precondition for the development of a modern land markets.[68] As explained in 6.3., this is closely related to the historic origin of the *numerus clausus* in the civilian tradition[69] and similar reasons can be found at the roots of the property law of contemporary common law systems.[70] The idea still carried weight in the 20th century,

[63] Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (n 61) 714–715.
[64] Rudden (n 57).
[65] ibid 252–260.
[66] Akkermans (n 4) 108.
[67] Rudden (n 57) 250, 257; Akkermans (n 4) 104.
[68] Francesco Parisi, 'Entropy in Property' (2002) 50 Am J Comp L 595, 601.
[69] Akkermans (n 4) 104.
[70] See AH Manchester, *A Modern Legal History of England and Wales, 1750-1950* (Butterworth 1980) 304, 310–311; William Cornish and others, *Law and Society in England 1750-1950* (2nd edn, Hart 2019) 135, 168–170.

as evidenced by the warning against the danger that proprietary burdens have on the marketability of land made in the American Restatement of the Law of Property (1944) and the English Law Commission's Report (1984) on Land Obligations.[71]

By the end of the 20th century the best economic arguments available in the context of Anglo-American property law to justify the sort of restrictions created by the *numerus clausus* were still based in concerns with the excessive splitting of property rights over durable assets.[72] However, this type of concern did not have a deep impact in the way Anglo-American legal scholarship understood the relation between freedom of contract and property law until Michael Heller framed it as part of his 'tragedy of the anticommons'. His basic idea is that an excessive fragmentation of property rights over the same resource gives rise to an excessive number of veto-rights holders, which may lead to collective waste by under-consumption. Thus, he argued that, in American property law, the ability of the owner to break up the bundle of rights is subject to the restriction that she does not decompose it in ways that impair the object's marketability.[73] He illustrated the argument with the Humpty Dumpty tale: it is very easy to break an egg, but once it is shattered into pieces, there is no force that can resemble its parts.[74]

According to Francesco Parisi, this implies that the mandatory standardizations of property rights can be justified in avoiding fragmentations that might lead to the tragedy of the anticommons. Building on Heller's argument, Parisi argued that the *numerus clausus* is a legal device to avoid the dysfunctional fragmentation of property. According to him, in all legal traditions, economic forces subject property rights to a fundamental 'law of entropy'. Such law induces a one-directional bias towards their inefficient fragmentation, because splitting the bundle of property rights is relatively easy, while re-uniting it is subject to high transaction and strategic costs. As a result, initially, contractual limitations of ownership look reasonable, but then, when an

[71] See Rudden (n 57) 252-253.
[72] Merrill and Smith (n 60) 6.
[73] Michael Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 Harv L Rev 621, 677, 664.
[74] Michael Heller, 'The Boundaries of Private Property' (1999) 108 Yale LJ 1163, 1169.

opportunity arises that requires exploiting the complementarities now fragmented, the initially attractive fragmentation proves suboptimal, due to the great costs of reunification.[75]

Arguments like that of Parisi have been questioned for a long time by scholars holding that this is not a problem for courts, but for the market and the registration systems.[76] For Epstein, if the seller wants to attach idiosyncratic covenants to the land, as long as an effective registration system is in place, the fragmentation problems will simply be reflected in a reduction in the price.[77] However, for Parisi, this assumption does not work. Rational owners that anticipate the costs and benefits of fragmentating property rights would realize that such fragmentation might turns out to be suboptimal in the future and that the re-unification of the fragments might be costly. Thus, they would charge a higher price for the sale of the fragmented parcels. However, this does not facilitate optimal allocation of proprietary entitlements because the higher price charged by the original seller of the fragments will not affect the costs of reunification: no matter how much surplus was captured by the original seller, higher prices will have to be paid to restore the original unity. In simpler terms, the party creating the novel right will not bear the fall in the value of the thing, as the re-unification costs will need to be incurred by successor in title, at a later moment. Hence, to balance these asymmetrical frictions, all modern legal systems have doctrines that work as a 'gravitational force' that limits the disintegration of property rights (e.g., the *numerus clausus*) and promote the re-unification of its bundle.[78]

(ii) Optimal standardization

The anti-fragmentation argument was subject to a different criticism by Merrill and Smith, in one of the first papers that explicitly borrowed the civilian nomenclature of '*numerus clausus*' in the US.[79] They stated that this argument does not hold, because

[75] Parisi (n 68) 595–596, 613–614, 622, 627–628; Francesco Parisi, 'Freedom of Contract and the Laws of Entropy' (2003) 10 Sup Ct Econ Rev 65, 67–75.
[76] Rudden (n 57) 253.
[77] Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' (n 62) 1359, 1360, 1368.
[78] Parisi (n 68) 613–614, 627–628.
[79] Merrill and Smith (n 60).

the system of estates is flexible enough to always find a way to make a complicated conveyance possible and argued that these problems are addressed in the common law by other doctrines. They looked into the English common law for a better rationale, which they found in a passage from *Keppell v Bailey* holding that:

> *There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations (…); but great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed.* [80]

In Merrill and Smith's view, restated in modern terminology, what the Lord Chancellor held was that, permitting unprecedented covenants '*would create unacceptable information costs to third parties*'.[81] When individuals encounter property rights, they face measurement problems, either for acquiring them or to avoid violating them. In consequence, when idiosyncratic property rights are created, three different groups of people are affected: originating parties, potential successors in interest and other market participants. For the two first groups, the measurement costs will be mediated by the price system, but the measurement costs imposed on other market participants will not be fully internalized in the price. In this view, standardization of property rights stems from the need of controlling such externality.[82]

This model goes one further step forward, as it also acknowledges that standardization comes with its own costs, as mandatory rules might sometimes prevent parties from achieving a legitimate goal in a cost-effective manner. Although the *numerus clausus* might frustrate some objectives of the parties, often those goals can be accomplished by more complex combinations of the available standardized property forms. Nonetheless, this does not make the principle trivial, as parties willing to have tailored property interests can only achieve this by incurring higher planning and

[80] *Keppell v Baily* (1834) 2 My & K 517, 39 Er 1042, at 1049.
[81] Merrill and Smith (n 60) 26.
[82] ibid 26–34.

implementation costs. As a result, the existence of a trade-off between measurement costs and frustration costs should lead legal systems to reach an optimal standardization of property rights. In this process, more simple forms will be adopted first, and more complex forms will appear until marginal costs equal the benefits.[83]

(iii) Verification for conveyance

The optimal standardization argument installed the *numerus clausus* as a central object of interest in contemporary law & economics. Hansmann and Kraakman agreed with Merrill and Smith that third party information costs are at the core of the justification of the *numerus clausus*. However, they argued that the principle does not aim to avoid externalities on other market participants, but to allow successors in title to verify the existence of third-party property rights in the asset they acquire. They take the key to property rights to be that they are enforceable against subsequent owners. Thus, when two persons have rights in a single asset, there needs to be a common understanding of those rights (problem of coordination). Even without this problem, they might need to be assured that the other party will not make opportunistic use of its right in the same asset (the problem of enforcement).[84]

On this view, solving the coordination problem requires each party to understand the other parties' respective rights, while solving the problem of enforcement implies that the enforcer must be able to understand (verify) the parties' understanding of the involved rights. In contractual rights, the agreement itself is the way to solve both problems, so there is no need for restrictions;[85] although it might be more precise to say that, in pure contractual obligations, verification turns into a problem of evidencing and construing the content of contracts.

Hansmann and Kraakman argue that the problem of verification is more difficult for property rights, because the holders of rights in the same asset might not be in privity

[83] ibid 35–40.
[84] Henry Hansmann and Reinier Kraakman, 'Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights' (2002) 31 JLS 373, 374, 378–378, 382–383.
[85] ibid 382, 383.

of contract. In their view, property law solves these problems by setting out certain 'verification rules' that address under which conditions a given right will run with the asset. These rules involve costs for users, nonusers and the system, which can be allocated in different manners among them. Rules that allow parties to tailor property rights to their needs ('accommodating rules') imply relatively low costs for users (i.e., the parties), but impose high costs on non-users and the system; while the rules that do not allow parties broad discretion to accommodate property rights, tend to allocate relatively more costs on users, and less on non-users and the system. They argue that a property regime should maximize the aggregate value of assets to rights holders, less the cost for users, non-users and the system. Thus, an efficient legal system will offer special accommodation to divided property rights only where the benefits to users exceed the overall costs.[86]

(c) A polyfunctional approach

The three main arguments that ground the *numerus clausus* in efficiency considerations present themselves as largely incompatible. However, if it is realized that they focus on different effects of property rights, the opposite becomes apparent. The three theories work on the implicit assumption that a legal doctrine can serve only one function, and that one practical purpose can only be served by one doctrine. However, as shown by other legal disciplines that specialize in functional approaches to the law,[87] this is not true. As said above (6.1.), utilitarian arguments are justifications that relate legal institutions to their effects in the real world (to what they *do*) and one institution can do more than one thing. If proper attention is given to the different nature of the transaction costs discussed by each of these theories, it becomes apparent that they perform complementary functions within the context of a market economy.

The main conceptual argument to reject the anti-fragmentation policy as part of the underpinning of the *numerus clausus* is that the involved parties could also solve these

[86] ibid 383–384, 396–397, 419.
[87] See Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd edn, OUP 1992) 72–73; Kischel (n 6) 90–91.

problems by direct dealings,[88] turning the anti-fragmentation into a mere incidental effect.[89] This argument overlooks that, as suggested by Parisi, this sort of private dealing can be subject to incredibly high transaction costs. Even if there are only two clearly identified parties involved, both hold a monopoly position that allows them to exercise speculative behaviours in their negotiations, which creates high transactions costs that might prevent them from a reaching a deal.[90] These problems are only increased when parties are not clearly identifiable, difficult to reach, made up of many individuals, etc. Indeed, Chapter 8.2 of this dissertation will show that *Keppell*, the case used by Merrill and Smith to build the optimal standardization theory, is better explained by an antifragmentation rationale.

Similarly, the *numerus clausus* also plays a key role in reducing transaction costs related to the transfer of assets. Epstein argued that a robust recordation system that serves to give notice would make standardization superfluous[91] and Merrill and Smith accept that the impact of idiosyncratic property rights on successors in title is internalized in the price.[92] Even if they have a point, both overlook that, in practice, the transfer of rights is subject to relevant transaction costs, arising from the need of verifying that the seller has good title to the asset and identifying the possible duties or liabilities associated with its acquisition, which is, more or less, the point made by Hansmann and Kraakman. As suggested by Rudden and Merrill and Smith, these costs might well be reflected in a lower price, but they still must be incurred by someone and, because they are transaction costs, they will not be fully transferred as part of the price to the other party, resulting in a net efficiency loss. Of course, as argued by Epstein, having a robust registration system that serves to give notice to third parties regarding the existence of such rights would contribute to lowering these

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[88] See Rudden (n 57) 257. The other argument made by Merrill and Smith, that the fragmentation problem is tackled by other doctrines, is unconvincing. It not only assumes that the antifragmentation cannot be served by more than one doctrine, but grounds its points by reference to doctrines that also operate in cases in which there is no fragmentation, as adverse possession.
[89] Merrill and Smith (n 60) 6.
[90] On this sort of strategic behavior, see Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harv L Rev 1089, 1106–1110; Richard Epstein, 'A Clear View of The Cathedral: The Dominance of Property Rules' (1997) 106 Yale LJ 2091, 2093–2094.
[91] Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' (n 62).
[92] Merrill and Smith (n 60) 32–33.

costs, but this still might not be enough. For what is worth, Germany, which is seen as adhering to a strict version of the *numerus clausus* and has strong registrations system,[93] sees the standardization of property rights as a doctrine that helps to provide clarity regarding their content and argues that this is a function different but complementary to the notice effect achieved by registration. [94]

One reason that justifies the *numerus clausus* principle from the perspective of the transaction costs associated with conveyance is that registration of non-standardized rights only allows others to find out that a right exists, but does not tell the buyer, *per se*, anything about its nature and content. In other words, registration solves the problem of finding out about the existence of the contract, but it does not solve the problems of its construction (interpretation, gap filling, etc.). This marketability problem is efficiently tackled by the *numerus clausus* by limiting and standardizing the problems associated with the transfer of wealth. This is apparent in an example of everyday legal practice: when one company is acquiring another, the complexity, risks and workload associated with making a due diligence of the contracts of the acquired company is normally much higher than that of its property rights.[95] This difference does not arise from a problem of notice (all relevant information is being handed over by the seller to the buyer), but from the fact that the possible contingencies associated to contracts are infinite and their forms unforeseeable, while with property rights, the buyer knows exactly what the possible problems are (*Typenzwang*) and what are their boundaries (*Typenfixirung*).

Finally, the criticism made by Hansmann and Kraakman to the optimal standardization theory is not fatal. The three basic problems they identify in Merrill and Smith's thesis are essentiality aspects of the standardization of property rights that such a theory fails to explain.[96] However, the failure to explain some features does not imply that a thesis is wrong in regard to those elements it actually explains, in this case, that the mandatory standardization of property rights serves to reduce the overall costs of

[93] See 8.1.
[94] See BayObLG, NJW 1967, 1373. On this, see 6.3(a) and 8.3.(a).
[95] Drawing from my experience as corporate lawyer.
[96] See Hansmann and Kraakman (n 84) 380–382.

people dealing in the same market. What this criticism is truly pointing to, is that *numerus clausus* might be serving a wider array of purposes regarding the circulation of wealth in the market, and that each of these three economic justifications might simply be one external outcome of a common internal rationality. However, the highly formalized and abstract approach of economic analysis of law makes it difficult to look for a common conceptual justification. In the next section I will attempt to find this underpinning by switching to a comparative method to look for the meaning and function of the principle of *numerus clausus* in two of the main jurisdictions where it originally developed: England and Germany.

6.3. Right-based justifications

Right-based justifications for the *numerus clausus* available in Germany and England are largely underpinned by domestic doctrinal elements and concrete historical problems. This has relevant consequences. First, different to modern efficiency-based arguments, which are framed in the abstract and universalist terms of microeconomics, right-based justifications for the *numerus clausus* seem, at least on the surface, extremely dependent on arbitrary considerations of national doctrine. Second, as these right-based arguments did not develop in the 'aseptic' environment of law & economics, they are also frequently linked in very tangible manners to their historical context, making them appear as somehow contingent to no-longer relevant problems from early industrial societies. Therefore, these arguments cannot be presented in isolated terms, without losing much of their grasp. Considering the well-known divergence in the style of German and English property law, the following subsection will present these arguments separately, as available in the context of contemporary national doctrine.

(a) The German approach

The universal inclusion of the *numerus clausus* among the foundational principles of German property law accounted for in Chapter 4.2 stands in strong contrast with its normally only apodictic justification in textbook and commentary literature.[97] When justification is provided, it normally relies on the broad idea that, if absolute rights must be respected by everyone, the content and boundaries of their zone of protection need to be easily established.[98] According to Wolfgang Wiegand[99] and Holger Fleisher,[100] this seems to be reflecting that the *numerus clausus* is so entrenched in German law that it does not need any material legitimation. The fact that, until recently, the attempts of the law & economics movement to provide a clear efficiency justification for the principle have been barely noticed, [101] is a good example of this.[102]

This does not imply that the German version of the *numerus clausus* has no justification or that it is unimportant or uncontroversial.[103] Indeed, most of its justifications are linked to some core ideas of German private law. Fleisher has grouped them into traditional and modern justifications, the former including a dogmatic, an historical and a philosophical argument; and the later corresponding to a policy argument identified with the protection of the 'circulation of wealth'.[104] He presents these theories as different justifications of the principle, but a careful analysis shows that the four can be linked by a common rationality: the dynamic preservation of personal freedom regarding the use of things. In this subsection this link will be built

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[97] Holger Fleischer, 'Der Numerus Clausus Der Sachenrechte Im Spiegel Der RechtsÖkonomie' in Thomas Eger and others (eds), *Internationalisierung des Rechts und seine ökonomische Analyse. Festschrift für Hans-Bernd Schäfer zum 65. Geburtstag* (Gabler Verlag 2008) 127.
[98] E.g., Larenz and Wolf (n 23) 252; Fabian Klinck, 'Sachenrecht' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 1274.
[99] Wolfgang Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' in Gerhard Köbler (ed), *Karl Kroeschell zum 60. Geburtstag dargelegt von Freunden, Schülern und Kollegen*, vol 60 (Verlag Peter Lang 1987) 623.
[100] Fleischer (n 97) 127.
[101] ibid 127, 131.
[102] Although it might also be a consequence of the continental hostility towards Law & Economics.
[103] See Rolf Stürner, 'Dienstbarkeit Heute' (1994) 194 AcP 265, 274–276.
[104] Fleischer (n 97) 127–131.

backwards, starting from the superficial dogmatic layers, moving through its historic dimension until reaching its policy and ultimate philosophical foundations.

(i) The dogmatic argument

Neither the BGB nor the *Motive* provide an explicit justification for the principle of *numerus clausus*. According to von Heck, [105] the only scholar who showed interest in its origin prior to Wiegand,[106] the legislative materials do not allow the identification of the reasoning for its establishment. However, according to Wiegand, this is only the case when the analysis is restricted to the *Motive*, as the drafters' motivation behind the *numerus clausus* becomes clear once it is seen in its historical context. According to him, this rationale can be found in the general viewpoints of the *Motive*, which present the *numerus clausus* as a logical consequence of what the drafters saw as substantive dogmatic improvements over the pre-existing ALR, consisting in the creation of a self-sufficient property system that works fully independently from the law of obligations.

According to this argument, the inclusion of the *numerus clausus* in the *Motive* was predated by the development of two key doctrinal ideas during the 19th century: the autonomy of property law (developed here) and the abstract concept of ownership (developed below as 'historical argument'). In the *Motive*, the *numerus clausus* is presented as an apodictic deduction of the main idea behind the first: the inherently correct strict division of rights over things and persons.[107] The starting point for this development is found in Savigny's 'System of Roman law'. As explained in Chapter 3.2, after introducing the concept of legal relation (*Rechtsverhältnis*), he argued for a universal and clear-cut division between property law and the law of obligations.[108] This view was taken by Reinhold Johow, the drafter of the preliminary version of the property section of the BGB, who understood that, as a necessary consequence, the

[105] Philipp von Heck, *Grundriss Des Sachenrechts* (Mohr 1930) 88.
[106] See Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' (n 99) 625.
[107] ibid 627, 630.
[108] See Friedrich Carl von Savigny, *System Des Heutigen Römischen Rechts*, vol 1 (Veit & Comp 1840) 331–345, 367–379.

acquisition of property rights must depend on features that are entirely within the domain of property law, excluding any causal regression to contractual autonomy in establishing the content of property rights.[109] In this line, Wiegand argues that the *Motive* saw as obvious that parties could not be allowed to freely create property rights over things, a point from which the principle of *numerus clausus* followed like a theorem.[110]

(ii) The historical argument

The other doctrinal concept that had a key influence in the birth of the German version of the *numerus clausus* is the absolute or abstract concept of ownership,[111] already discussed in Chapter 3.2. The European *Ius Commune* inherited a fragmented understanding of property law from feudal law. In this system both the tenant and the landlord could have ownership rights over the same land which the Glossators and Post-glossators, called *dominium utile* and *dominium directum*. If one of these positions was to be seen as more important, it was that of the landlord who did not hold the land (*dominium directum*). Lead by Grotius and using the concepts of Roman law, the Natural Law School tried to overcome this fragmentation, arguing for a 'unitary notion of ownership', in which only one person could be the owner and any other property right became a *ius in re aliena* (a right in another's thing). This idea was then adopted by the French Revolution and the *Code Civil* as part of the political process to bring feudalism to an end, making the *dominium utile* (that of the vassal) the only form of ownership.[112]

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[109] Including the clear separation between the sale of a thing (a contract) and the transfer of its property. See §§ 433 and 929 BGB.

[110] Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' (n 99) 630, 635; Wolfgang Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (1990) 1/2 AcP 112, 113; Wolfgang Wiegand, 'Funktion Und Systematische Stellung Des Sachenrechts Im BGB' in Michael Martinek and Patrick L Sellier (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Eiführungsgesetz und Nebengesetzen. 100 Jahre BGB - 100 Jahre Staudinger* (Sellier & de Gruyter 1999) 111.

[111] Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' (n 99) 627, 628; Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (n 110) 117; Wiegand, 'Funktion Und Systematische Stellung Des Sachenrechts Im BGB' (n 110) 112.

[112] Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia 2008) 19, 20, 56–81.

In a similar spirit, the BGB was the product of the liberal political ideas that became dominant in Germany during the 19th century, including the desire to overcome feudalism.[113] In this process the unitary notion of ownership gained immense popularity thanks to the work by Thibault ('On *dominium utile* and *directum*') coming to be seen as the cornerstone of a desirable property system.[114] As a result, the drafters of the BGB were explicitly required to shape its property law as a system that ensures a 'free ownership'.[115] In strong contrast with the Anglo-American 'bundle picture',[116] in this conception, '*ownership is no longer understood as an aggregate of powers or rights, but as an encompassing and total dominion, that is indivisible and always the same*'.[117] Thus, ownership can only be restricted by personal rights or by creating one of the limited real rights accepted by the *numerus clausus*. Any unauthorized fragmentation of ownership infringes the *numerus clausus*,[118] making the principle a guardian of a unitary notion of ownership.[119] This justification still has force in German law, as evidenced by a leading *Kommentar* holding that '*the sense and purpose of the prohibition on the free configuration of property rights is to preserve their essential content (…)*'.[120]

(iii) The policy argument

In recent times these traditional justifications of the *numerus clausus* have been seen as insufficient by German scholars, leading them to develop a more institutional or

[113] Schwab and Löhnig (n 20) 25–26; Zweigert and Kötz (n 35) 144–149.
[114] Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' (n 99) 628.
[115] See Heinrich Honsell, 'Einleitung Zum BGB' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 7–8, 13.
[116] See 3.3.
[117] Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (n 110) 117, my translation.
[118] van Erp (n 4) 1044.
[119] Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' (n 99) 635.
[120] Hans Hermann Seiler, 'Einleitung Zum Sachenrecht' in Elmar Bund and others (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Sellier & de Gruyter 2007) 26, my translation.

policy-oriented grounding for the principle.[121] In this process, Wiegand's historical explanation of the content, significance and function of this dogma played a key role. During the second half of the 19th century, Germany experienced a radical economic and social transformation, that left modern industrialized areas existing side by side with regions dominated by traditional economic relations.[122] Against this background, Wiegand argues that, during the 19th century, the burdens and fragmentations allowed by the ALR came to be seen as having a deeply negative impact in the circulation of wealth,[123] arguing that the rapid success of the doctrinal concepts associated with the *numerus clausus* are better explained by the fact that they were in step with the leading policy ideas of the time, especially with the protection of free trade.[124] For Wiegand, that this 'interest in legal traffic' (*Verkehrsinteresse*) is the real justification of the *numerus clausus* becomes apparent in a number of doctrinal elements of the BGB, including the provision declaring that obligations not to dispose of the thing have no effect on a third party, the choice for an abstract transfer system and a wide protection for good faith acquirers.[125]

At the beginning of the 21st century, this seems to be the leading justification for the *numerus clausus* in German doctrine,[126] evidencing some degree of convergence with the arguments of the Law & Economic movement. Following Fleisher, it could be summarized as follows: third parties must be able to rely on the fact that acquired things will only be subjected to the limitations and burdens set forth in the law. Protection of circulation becomes especially important when it comes to property rights, because they affect third parties, normally, with no time limitation. This way, by restricting the free delineation of property forms, the law protects legal security, legal

[121] Fleischer (n 97) 129.
[122] Cornelius Torp, 'The Great Transformation: German Economy and Society, 1850-1914' in Helmut Walser Smith (ed), *The Oxford Handbook of Modern German History* (OUP 2011) 336–337.
[123] See Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (n 110) 131; Wiegand, 'Funktion Und Systematische Stellung Des Sachenrechts Im BGB' (n 110) 112.
[124] See Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' (n 99) 628, 638, 639.
[125] Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (n 110) 118–119; Wiegand, 'Funktion Und Systematische Stellung Des Sachenrechts Im BGB' (n 110) 113.
[126] See Jan Wilhelm, *Sachenrecht* (5th edn, De Gruyter 2016) 10; Marina Wellenhofer, *Sachenrecht* (34th edn, Beck 2019) 27; Klinck (n 98) 1274.

clarity and legal simplicity.[127] In this view, standardization of limited property right plays a different role than registration, as it seeks to protect legal traffic by creating abstract types, that are known beforehand by parties, leaving idiosyncratic agreements to the law of obligations.[128]

(iv) The philosophical argument

The current emphasis on 'legal traffic' and its economic rationale should not obscure that, for the contemporaries to the drafting of the BGB, the doctrinal package made of absolute ownership, *numerus clausus* and autonomous property law also had a strong philosophical underpinning of a less utilitarian nature, linked to the importance of ownership in the preservation of personal freedom.[129] The ideas of political liberalism that became dominant in Germany during the 19th century were indissolubly tied to the notion of 'free ownership' (*Freiheit des Eigentum*), which is visible in some classic sentences of the BVerfG, holding that '*ownership is (…) a guarantee of personal freedom (…) that provides its holder with a space of patrimonial freedom to live an autonomous life*'.[130]

The philosophical justification for this link between ownership and freedom can be traced to the loose influence of Kant and Hegel in Savigny's theory of will.[131] Hegel argued that private property is justified because it contributes to personal freedom.[132] For him, human freedom is brought into existence by means of the abstract freedom of ownership.[133] In this view, the standardization and limitation of the property interests that can burden ownership are part of a struggle to free ownership from its feudal content.[134] The philosophical underpinning behind this view can be found in §§ 41-45

[127] Fleischer (n 97) 130.
[128] Jörg Mayer, 'Dienstbarkeiten' in Wolfgang Wiegand (ed), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 3. Sachen Recht. EbbVo; §§ 1018-1112* (Sellier & de Gruyter 2002) 222–223, referring to servitudes.
[129] E.g., see von Heck (n 105) 87.
[130] BVerfGE 24, 367, 389, my translation. Also see BVerfGE 50, 290, 339.
[131] See Larenz and Wolf (n 23) 21–22, 240–242.
[132] Dudley Knowles, *Hegel and the Philosophy of Right* (Routledge 2002) 116.
[133] Joachim Ritter, 'Person Und Eigentum' in Ludwig Siep (ed), *G. W. F. Hegel – Grundlinien der Philosophie des Rechts* (3rd edn, De Gruyter 2014) 61.
[134] Rudden (n 57) 250.

of Hegel's 'Elements of the Philosophy of Right'.[135] According to it, the distinctiveness of the person is far from mere subjectivity (§§41 and 42) and needs an external sphere of freedom in which to be expressed (§ 41). Thus, the 'free will' only becomes actual by its exercise as possession over things of the outside world (§45). This way, for Hegel, free ownership is a necessary requirement of personal freedom.[136]

(v) Synthesis

Despite being presented separately, these four different justifications can be understood as reflecting different aspects of a single general idea. The dogmatic and historical justifications seem to be no more than two sides of the same phenomenon, corresponding to the technical aspects of developing a type of property that concentrates as many powers as possible in a single hand. However, they do not seem to be the ultimate normative justification of the *numerus clausus*, but legal means to achieve two substantive ends are at the core of modern thinking. Both arguments point to the abstract and unitary notion of ownership for its normative foundation. This grounding seems to be twofold: on one hand, the unitary notion of ownership and the *numerus clausus* principle seem to be justified by their positive effects in creating a modern industrial economy. In other words, one possible justification is the broad utilitarian idea that aggregate social efficiency is increased by reducing the transaction costs of the market allocation of wealth. On the other hand, the German *numerus clausus* also seems to have a principle-based justification underpinned by the idea that the respect of personal freedom implies that parties should, in principle, not be subject to non-consented obligations.

The market and the freedom-based justification are not necessarily exclusive but are not the same and might conflict.[137] However, in most cases both are not only compatible, but complementary: to remain valuable for economic and legal traffic, things and people need to remain essentially unburdened. In most cases, people

[135] Hegel (n 48) 66–69.
[136] Knowles (n 132) 112–113, 117; Ritter (n 133) 55, 61.
[137] See Stürner (n 103) 275–276.

acquire things to use them, either for economic purposes (e.g., to rent out a house) or direct satisfaction of personal needs (e.g., to live in the house). Following the Hegelian justification of ownership, in both cases, things are valuable and circulate in the market because they enable people to unfold their freedom by using them.

This justification has, at least, two gaps. First, it does not develop on the different third-party effects of property rights. The Hegelian and the policy argument implicitly focuses on restricting successor liability and facilitating conveyance. In line with this, German doctrine does not discuss the impact of the *numerus clausus* on trespassory liability.[138] However, as recently shown by English scholarship (see next subsection), this does not imply that it has no relevance in such context. Indeed, Chapter 7.3 will argue that, although German doctrine does normally not directly link it to tort law, the *numerus clausus* also has relevant effects in protecting strangers from liability arising from non-consented duties.

Second, German scholarship does not have a developed conceptual argument to justify the judicial infringement of the *numerus clausus*. Wiegand explains these deviations as a consequence of the essentially flawed project of the drafters of the BGB of having a fully self-sufficient property system. According to him, property was the central figure in feudal times but, after the end of the ancient regime, its relative importance decreased, as more and more patrimonial relations were taken over by the law of obligations. By the end of the 19th century this process was complete: thanks to industrialization, the enormous growth of the law of obligations had displaced property law. Already the contemporaries to the drafters of the BGB held that property law might be too formal and abstract to satisfy new economic needs,[139] as exemplified in Chapter 4.2 with the development of the security ownership. This suggests that the deviations from the principles of *numerus clausus* are most likely underpinned by policy considerations, which is consistent with the growing (but also limited) regard that German judges are expected to have for the consequences of their decisions.[140]

[138] See 7.3.
[139] Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (n 110) 131–134.
[140] See 5.2.

(b) The English approach

Due to the historical absence of a consciously developed *numerus clausus* doctrine, English law lacks the explicit long-standing justifications for the principle available in Germany. Some even argue that the function of the *numerus clausus* in England remains unknown.[141] Nonetheless, clear attempts to justify its substance can be found in two different contexts. The first does not normally deal explicitly with the principle but emerges from the actual historical rationality underpinning *Keppell v Bailey*, *Hill v Tupper*,[142] and the LPA 1925.[143] To a large extent, this rationality seems to tie the *numerus clausus* to the broad idea of protecting the marketability of land. The second justification is more recent and corresponds to a conscious reaction to the growing influence of the utilitarian justifications discussed in 6.2. Its core idea is shifting from the economic effects of the principle to its conceptual underpinning.[144] Since the conceptual argument builds on the historical development of the principle, this subsection will first provide a brief view of the historic origin of the principle in England and then will attempt to systemize these historical elements based on the conceptual approach.

(i) The historical policy concerns

The origin of the common law doctrine of *numerus clausus* is closely linked to some deep problems in the marketability of land found in 19th century England. By the beginning of the century, England still kept much of its medieval land law. This system was remarkably complex,[145] tending to fragment ownership in a manner that created important difficulties for the transfer of land.[146] As a result, the 'land question' became

[141] E.g., Simon Gardner, '"Persistent Rights" Appraised' in Nicholas Hopkins (ed), *Modern Studies in Property Law*, vol 7 (Hart 2013) 351.
[142] (1863) 2 H & C 121, 159 ER 51.
[143] For details, 4.3.
[144] See Ben McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' in Susan Bright (ed), *Modern Studies in Property Law*, vol 6 (Hart 2011) 311, 314.
[145] See Manchester (n 70) 302.
[146] See Stuart Anderson, 'The 1925 Property Legislation: Setting Context' in Susan Bright and John Dewar (eds), *Land Law. Themes and Perspectives* (OUP 1998) 110; Elizabeth Cooke, *Land Law* (2nd edn, OUP 2012) 41.

a topic of major public concern, with Benthamite radicals, including Lord Brougham,[147] permanently pressing for reforms. In this context, the Real Property Commissioners of the 1829-33 period -the time of *Keppell*- saw the conveyancing system as the central problem. The 'land question' remained a contested problem for the rest of the century. By the time of *Hill*, radicals were campaigning for 'free land', with the Land Law League promoting the free transfer of land and the restriction of the power of tying it up among its main goals. Parliament tried to tackle these problems by a variety of legislation, but no substantial nor successful reform was achieved,[148] until the 1922-1925 property legislation.[149]

The doctrinal foundations of today's common law version of the *numerus clausus* are still found in this context.[150] Even if *Keppell* did not identify the principle by name, Lord Brougham offered a tangible justification as to why courts rejected attempts to enforce the claimant's right against third parties, already quoted above when discussing Merrill and Smith's optimal standardization theory. As argued in Chapter 8.2, whether this passage also has the implications these authors attribute to it is a different story. For now, it is worth noting that, very much in tune with his time, Lord Brougham was concerned with both doctrinal and policy concerns: he saw idiosyncratic property rights as '*clearly inconvenient both to the science of the law and to the public weal*'.[151] The harm to the public good did not only involve '*confusion'* (the point of Merrill and Smith), but also problems in conveyancing as, '*it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed';* and impairing the free use of land by successors in title, as '*great detriment would arise (…) if parties were allowed to invent new modes of holding and enjoying real property (…) which should follow them into all hands, however remote'.*[152]

[147] Cornish and others (n 70) 69, 168, 175.
[148] For all the historical background, Manchester (n 70) 302–326.
[149] See Cooke (n 146) 39.
[150] See William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (3th edition, OUP 2013) 174–177; McFarlane (n 142).
[151] at 137.
[152] Idem.

In *Hill*, Pollock CB was less explicit in providing an underlying justification to deny the enforcement of idiosyncratic rights against third parties.[153] However, the key substantive consideration seems to have been that the company that had granted the rights was not entitled to create novel rights that would bind the defendant. The link between both cases is not clear, but the rejection of the claims in *Hill* has been said to be better explained as an expansion of the principle stated in *Keppell*: if a right is not able to bind successors in title (if it fails the *Keppell* test), *a fortiori*, it cannot bind a stranger.[154]

This brief analysis of *Keppel* and *Hill* suggests that the origin of the English version of the *numerus clausus* relates to three different elements: first, pure conceptual legal correctness (allowing idiosyncratic property rights would be '*inconvenient [..]to the science of the law')*; second, providing clarity as to the content of property rights in order to facilitate their marketability; and third, a conceptual reluctance to subject both successors and pure strangers to duties to which they have not consented. The last of these elements is the cornerstone of the conceptual argument recently advanced in England.

With the LPA 1925 the *numerus clausus* finally found its way into statutory law.[155] However, the main purpose of the legislation was not to limit the free creation of new property forms, as this restriction was already a part of the common law.[156] The chief purpose of the act was to simplify the property system.[157] This is apparent in the fact that the only legal estates that the act allowed to subsist are the freehold and the leasehold, that is, property rights with *certain* temporal extensions: either indefinite (the freehold) or subject to a strict temporal limitation (the leasehold).[158] On Peter Birks' view, this choice aimed to ensure the free alienability of land by subjecting the temporal slicing of ownership to extremely certain limits and forcing anyone wanting

[153] See at 127-128.
[154] McFarlane (n 142) 12. Although in *Stockport* Bramwell B (dissenting) argued for the opposite rationale. See n 172 to 174 and accompanying text.
[155] See 4.3.
[156] Note that Swadling does not mention the LPA 1925 when accounting for the principle. See Swadling (n 150) 175–177.
[157] See Manchester (n 70) 324; Anderson (n 146) 109; Cooke (n 146) 41.
[158] See s.1 (1) Law of Property Act 1925.

to deal in other (complex) time slices to act '*behind the curtain of a trust'*.[159] Thus, the statutory enactment of the *numerus clausus* in England does not seem to add a new justification for such principle as it already existed in the 19th century common law. However, it suggests that the substantive delineation of the estates aims to provide certainty as to the boundaries of property rights to facilitate its marketability *over time*.

(ii) The conceptual argument

In recent years, Ben McFarlane has attempted to explain the piecemeal case law that limits the free creation of property rights by means of a principle-based approach.[160] This view emerged as a reaction to the policy-oriented justifications developed in law & economics. The central idea behind this approach is that the justification of the *numerus clausus* is to be found on a wider legal principle according to which agreements can generally not impose a duty or a liability on someone who is not a party to such agreement. According to McFarlane, the law & economics approach (*e.g.*, Hansmann and Kraakman) tends to neglect that property rights produce two different effects on third parties: successor and trespassory effects, only focusing on the first. He points out that successor liability is completely absent in *Hill* as the issue at stake was whether B, who had acquired rights relating to the land from A, could enforce such a right against a stranger (X). Since the claim was rejected under the argument that not-recognized forms of covenant could not impose duties on a stranger, any justification of the *numerus clausus* must also be able to account for its effects on trespassory liability. Relying on this, McFarlane holds that the justification for the *numerus clausus* is rather conceptual than consequentialist and corresponds to a more general legal principle holding that, generally, agreements cannot impose a duty or liability on someone outside such agreement.

This general principle is not absolute but requires that compelling reasons must be provided for its exceptions. In McFarlane's view, these good reasons are policy

[159] Peter Birks, 'Five Keys to Land Law' in Susan Bright and John Dewar (eds), *Land Law. Themes and Perspectives* (OUP 1998) 463.
[160] McFarlane (n 144) 311.

arguments: new property rights are recognized when the overall utility is increased by having third parties bound to such claims. Acquisition by first possession provides a clear example: once B takes control over a previously ownerless asset, all the rest of the world lose their pre-existing privileges in it, at least in regard to B, without consenting or even knowing it and are subject to a new duty to B of keeping off the asset.[161] In a similar line, Penner has recently argued that allowing certain rights that were only contractual in origin to run with the asset is justified by policy reasons.[162]

This need for a special justification for the non-consented loss of privileges is felt in many contexts, proving a solid intuitive grounding to the reluctance of private law to bind parties to new duties they have not consented to. For example, John Locke's theory of appropriation by first possession puts a lot of effort into justifying the existence of a general tacit mutual consent to the appropriation of assets previously held in common,[163] while modern Kantians justify these non-consented burdens in the existence of a system that allows everyone to actually or potentially acquire new things. [164] In modern times,[165] the justifications for acquisition by first possession have moved from these fictional forms of consent or reciprocity to utilitarian arguments. These include (i) internalizing the beneficial and harmful effects of the use of open access goods,[166] (ii) incentivizing the discovery, identification and characterization of valuable resources that would otherwise remain hidden[167] and (iii) allocating resources to the person who, with its effort in finding the resource, has evidenced having the knowledge and capacity to take advantage of it in a context that no one else has.[168]

By contrast, when new non-consented duties are imposed on third parties by the transfer of the pre-existing correlative right, this effect is not seen as requiring any special justification, as it does not take any further privileges away from them, but only

[161] ibid 311–312, 314.
[162] JE Penner, 'Property', *The Oxford Handbook of New Private Law* (OUP 2021) 281–282, 288–289.
[163] Locke (n 47) 16.
[164] E.g., Weinrib (n 42) 134. For discussion, see 6.4(a).
[165] Although the roots of the argument are old. See Gordley (n 55) 9.
[166] Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 Am Econ Rev 347.
[167] Richard A Epstein, 'Possession as the Root of Title' (1979) 13 Ga L Rev 1221, 1237–1238; Randy E Barnett, *The Structure of Liberty: Justice and the Rule of Law* (OUP 2000) 68–69.
[168] Epstein, 'Possession as the Root of Title' (n 167) 1238, 1239; Barnett (n 167) 68-69.

changes the identity of the correlative right holder. Thus, in practice, the problem of the contractual creation of non-consented duties on third parties arises when the owner of an asset (A) is allowed to retain her property and, at the same time, grant a property right in the same asset to another party (B), as the rest of the world (X) becomes subject to a new duty they had not consented to. This has a direct detrimental effect on third parties (not a mere informational externality), as they are now exposed to liability *vis a vis* two persons for the breach of two different rights,[169] a phenomenon Rudden named 'claim cloning'.[170]

According to McFarlane, avoiding this cloning effect played a key role in *Hill*, as later made apparent in *Stockport Waterworks Co. v Potter*.[171] In that later case, a riparian owner (A) granted the claimant (B) all its rights in a water flow, including the right to take water from an adjacent river, without transferring him the riparian land. The defendant (X) polluted the river and was sued by B. His claim was rejected because Pollock CB found that it is not possible for a riparian owner to keep his land and deal separately with the water. For this, he relied on *Hill* as an authority holding that a person cannot create by grant new property rights that give the grantee the right of suing the third party in his own name for the interruption of the right.[172]

It is not completely clear whether the court understood that A's separate dealing with the water rights attempted to clone its rights or to make an atypical transfer of rights.[173] If it was a cloning case, the holding would be underpinned by the idea that private dealings cannot invent types of property rights that will impose novel forms of non-consented liability on strangers. If this principle is restricted to the paradigmatic case, it implies that parties can only clone claims that will affect strangers when the law has previously authorized the creation of such property rights. As in the case of first possession, the reasons why the law authorizes this is to be found in pure policy

[169] McFarlane (n 144) 312–313.
[170] See Rudden (n 57) 251.
[171] (1864) 3 H & C 300, 159 ER 545
[172] At 566. For discussion, Joshua Getzler, *A History of Water Rights at Common Law* (OUP 2006) 316–320.
[173] At least Baron Bramwell (dissenting) seemed to understand that A had passed its property to B, see *Stockport*, at 327.

concerns: whether the overall utility will be increased if B is allowed to assert its right against X.[174] If this was a case of attempted transfer, then the protection of third parties seems to be more closely associated with information problems: if the right to use the water could be traded in gross, it would be very hard for X to find out who is the owner of such right, thereby creating uncertainty as to the content of the right and imposing information costs on X that could prevent the achievement of a Coasean bargain.

(c) Comparative remarks

At first sight, the justifications given for the adoption of a *numerus clausus* in Germany and England seem very different. In Germany, the principle is historically bound to the emergence of the unitary notion of ownership as part of the political project of bringing feudal rights to an end and the strong academic push of the Pandectist School to provide property law with a self-sufficient doctrinal structure within the system of the BGB. None of these elements seems to be present in England. English property law developed from feudal law with little romanistic influence and, by the time of *Keppell*, feudal duties had been abolished for a long time.[175] As a result, English land law did not develop a unitary notion of ownership and still relies on the traditional theory of estates.[176]

However, once the historical motivations of the drafters of the BGB, the LPA 1925 and the judges in *Keppell* and *Hill* are detached from the specific doctrinal constraints in which they developed, and understood in their broader context, it becomes apparent that both versions of the *numerus clausus* share a relevant functional and ideological similarity. With the arrival of modernity, the traditional personal bonds of a static agricultural economy lost their purpose and started to be seen as unnecessary and prejudicial burdens to the free use and trade of land. As industrialization spread from England to Germany,[177] the kind of personal ties with enduring third-party effects

[174] McFarlane (n 144) 313–314; McFarlane (n 142) 16.
[175] See 1660 Statute of Tenuere.
[176] See 3.3.
[177] Torp (n 122) 337.

allowed by traditional land law came to be seen as jeopardizing its circulation and transformation.

Faced with a similar problem, both jurisdictions came up with a similar solution: to limit the real burdens that the owner could impose on her land. Thus, the general 'traffic protection interest' that justifies the German version of the *numerus clausus* can be seen as also underpinning *Keppell*, *Hill* and the LPA 1925. The difference in the way the doctrine developed in both countries is better explained as an effect of their dissimilar political history and legal tradition. [178] In England, it developed slowly and progressively, led by the practical and piecemeal approach that characterizes the judge as the motor of the common law, reaching statutory law at the end of the journey. By contrast, in Germany, the concept developed from academic scholarship, finding it its way into private law in a single discrete legislative act: the entering into force of the BGB.

This generic interest in protecting legal traffic broadly encompasses all the narrow and highly formalized justifications for the *numerus clausus* put forward by the Law & Economic movements. However, in the German and the English case, this justification is embedded in legal doctrine, reflecting the actual historical ideology that shaped the principle, namely, a broad hostility to imposing duties on people who have not consented to them. Such argument holds that, in principle, people have an essential *right* not to be subject to duties to which they have not consented. In Germany, this idea is explicit in Savigny's theory of will, especially when it comes to strangers, and in the Hegelian justification of ownership, especially, in regard to successors of title. In England a similar conceptual argument can be found in McFarlane's reading of *Keppell* and *Hill*.

Unlike theories grounded on democratic values or utilitarian considerations, this argument is deeply internal to property law, as it forms the bedrock of modern private law systems. Due to the systematic nature of codified law, this idea is especially

[178] On these differences see Zweigert and Kötz (n 35) 181, 191, 193, 138–144, 257–259; Siems (n 24) 53–61.

apparent in civilian private law systems. For example, the BGB is said to be built upon a basic principle of self-determination or private autonomy emerging from a Kantian-based personalist ethic (*ethischer Personalismus*) according to which parties are free to decide on their relations with other people.[179] In the common law, the fragmentary nature of private law makes this less conspicuous, but it is self-evident that consent is central to contract law, while tort and unjust enrichment law are essentially concerned with providing a justification to impose non-consented obligations. As a result, similar to what happens in German private law, in the common law, theoretical rights-based approaches explicitly hold that private law is underpinned by the protection of autonomy.[180]

This deeper principle-based justification is not *per se* opposed to the policy justification based on the protection of traffic. As discussed above, the value that human beings attach to having freedom regarding how they use things is central to the classic utilitarian arguments that justify the *numerus clausus* in the protection of the marketability of land and also to the Hegelian thesis that links ownership to the unfolding of personal liberty.[181] Thus, in both traditions, the moral status that free will achieved in the private law of post-feudal societies was historically implemented by two closely linked principles: 'free' ownership and limits to non-consented obligations. The *numerus clausus* plays a key role in making both principles operative. In Germany this seems so obvious that it is frequently overlooked, while in England, the essentially pragmatic approach to legal problems has historically prevented the full articulation of this idea.

This principle-based justification does not provide any guide to explain the infringement of the principle by courts. In German scholarship, the development of new property forms is clearly explained by the pressures to deal with practical economic needs that surpass the rigid nature of the property system of the BGB, but this does not amount to a justification. The same happens in England, but this is less

[179] Larenz and Wolf (n 23) 21.
[180] E.g., Peter Cane, 'Rights in Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011).
[181] A similar reading has been suggested by Gordley (n 55) 16.

relevant, as the development of private law by pragmatic solutions to specific problems is essential to the common law. However, the broad justification offered by McFarlane for allowing some non-ownership property rights in general (i.e., pure policy considerations) can also be extended to the emergence of property rights outside the *numerus clausus*. In a line similar to Merrill and Smith's optimal standardization theory, in both England and Germany the infringement of the principle seems to be justified by pure (external) utilitarian considerations: when the structure of the existing property law is not capable of satisfying new social and economic demands, courts behave as if the creation of non-legislative property rights is justified.

6.4. Concluding remarks

(a) On the justification of the *numerus clausus*

The *numerus clausus* seems to be one of those doctrines that can be justified by either utilitarian or principle-based arguments.[182] As explained in 6.1, there is a wide agreement in modern philosophical thinking that both kind of arguments are ultimately incompatible. Nonetheless, the superficial compatibility of both strands of thought is enough to provide a consistent justification of the practical operation of the principle in England and Germany. The path I propose for this resembles, but also deviates from, Gold and Smith's idea of legal concepts working as local modules that diminish the informational costs of managing the system[183] or Cane's acknowledgement that the internal structure of private law is driven by external ideologies.[184]

The first key to reach the operative reconciliation of both justifications is to be found in the role that J.S. Mill attributes to 'secondary moral principles' in his effort to reconcile his utilitarian doctrine with the existence of liberal rights. At Mill's time, the distinction between act and rule utilitarianism had not yet been developed and he offers

[182] On this type of compatibility, Gold and Smith (n 12).
[183] ibid.
[184] Cane (n 180).

apparently contradictory views on this subject.[185] In some passages he holds that '*actions are right in proportion as they tend to promote happiness*',[186] while in others he holds that actions are right if they conform to '*rules and precepts of conduct by the observance of which (…) the greatest extent [of happiness might be] secured to all mankind*'.[187] Following Urmson,[188] both views can be reconciled by noting that they answer different questions: the first deals with the problem of moral rightness, while the second is part of a theory of moral obligation.

As to the latter, Mill holds that the utilitarian calculations that would be needed to adjust action to the principle of utility, even if possible, would be time consuming and are subject to bias and distortion.[189] Thus, he argues that much moral reasoning should be governed by 'secondary principles' about such things as fidelity, fair play, honesty, etc., which do not have a direct reference to utility, but still promote it.[190] Mill's utilitarianism seems to collide with his wider view of liberty. For him, humans need to have the conditions that assure sufficient self-governance. Thus, the only valid reason to limit the personal liberty of any individual is the avoidance of harm to third parties (the 'Harm Principle'). However, even if necessary, the Harm Principle is not enough to limit liberty: to do so, the harm avoided must also outweigh the negative effect of the restriction, making utilitarian calculations the ultimate criteria for protecting or restricting liberal rights. Nonetheless, in Mill's view this does not deprive liberty from moral value. As a secondary moral principle, the protection of others' liberty is morally justified, unless it is shown that the harm created by such regulation outweighs its benefits.[191]

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185 Michael Schefczyk, 'John Stuart Mill: Ethics' in James Fieser and Bradley Dowden (eds), *The Internet Encyclopedia of Philosophy* <https://www.iep.utm.edu/> accessed 15 March 2020.
186 Mill (n 41) 210.
187 ibid 214.
188 See JO Urmson, 'The Interpretation of the Moral Philosophy of J. S. Mill' (1953) 3 Phil Q 33.
189 Schefczyk (n 185); for direct reference, see Mill (n 41) 219–221, 225, 226.
190 For a full development, see David Brink, 'Mill's Moral and Political Philosophy' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Winter 2018) <https://plato.stanford.edu/archives/win2018/entries/mill-moral-political/>.
191 John Stuart Mill, 'On Liberty' in JM Robson (ed), *The Collected Works of John Stuart Mill. Essays on Ethics, Religion and Society*, vol XVIII (University of Toronto Press; Routledge & Kegan 1977) 223–226, 260–275, 292–293.

In this framework, the English and the German version of the principle of *numerus clausus* can be seen as doctrinal devices underpinned by a secondary moral principle holding that people should not be subject to a duty to which they have not consented, unless the creation of such rights is allowed by the law. The ultimate justifications for this can be found in the ideology of 19th century economic and political liberalism. By the same logic, judges are not required (in fact, are forbidden) to assess if, in a particular case, the benefits of creating a particular property right would outweigh the cost it imposes on third parties: they can only enforce the property rights that exist in the law. Under the principle of *numerus clausus*, English and German judges are not called to overrule this secondary moral principle based on utilitarian arguments. This decision is for the legislator, who -as argued in Chapter 5- is in a structurally better position to evaluate the cost and benefits of introducing a new property right. In this view, even if the *numerus clausus* might ultimately be justified by utilitarian policy goals, its justification in the context of English and German adjudication works *as if* it is underpinned by a non-utilitarian morality internal to private law. In contrast to what happens in the US, where the principle does not have the same legislative standing and policy arguments play a much more important role in adjudication, in England and Germany, the justification of the principle is ultimately grounded *outside* the law. However, as discussed below, the standing of the policy arguments that justify the occasional breach of the principle by courts is less clear.

Grounding the direct justification of the *numerus clausus* in right-based arguments or secondary moral principles does not imply that utilitarian considerations will lose all importance in adjudication. Even for advocates of rights-based views of the law like Dworkin, in some cases, rights might also have to yield in favour of other rights or urgent policy concerns.[192] However, when it comes to property law, contemporary supporters of right-based approaches tend to ignore this, making huge efforts to justify the imposition of non-consented duties by non-utilitarian arguments. Faced with the puzzle created by original acquisition, Weinrib justifies the imposition of non-consented duties on third parties that arise as a necessary consequence of the emergence of new specific property rights in a sort of systematic reciprocity

[192] Dworkin (n 30) 117.

consideration. In his view, every act of acquisition -and thus, the correlative imposition of non-consented duties- is justified by the others' actual or potential act of acquisition.[193] Ripstein, puts forward a different idea, arguing that legislation providing for original acquisition reflects the 'omnilateral' will of the citizen, as legislation is not unilateral when oriented to the public good.[194]

These arguments are unconvincing.[195] Weinrib's thesis does not amount to a justification for the imposition of non-consented obligations, but to a moral minimal requirement of any liberal democratic society: if the law allows someone to impose a non-consented duty on third parties, such power must be made available to everyone in equal terms. However, this argument does not provide any reasons as to *why*, in the first place, people should be able to act in such a way as to acquire rights that impose new non-consensual duties on third parties. Weinrib's argument can be reduced to the following: A can create a right in favour of B that will bind C and X without their consent, because C and X can do the same in regard to A. This seems rather tautological and denies the strong intuition that the imposition of non-consented duties is exceptional. In turn, Ripstein's reliance on the 'public good' seem better explained as a policy justification.

The non-consented duties that arise with the creation of new property rights are better justified by utilitarian considerations, which is widely consistent with experience, as evidenced by the development of the English restrictive covenant and the German *Treuhand* described in Chapter 4. In particular, Mill's acceptance of the exceptional overriding of secondary moral principles by utilitarian considerations provides a simpler and more intuitive explanation of the occasional breach of the *numerus clausus* principle by English and German courts. This view is also consistent with Nonet and Selznick's socio-legal model described at the end of Chapter 5.4, according to which the formal (internal) structure of the law tends to yield to substantive policy arguments when it is pressed by litigators aiming to make it more 'responsive' to social

[193] Weinrib (n 42) 134.
[194] See Arthur Ripstein, *Force and Freedom* (Harvard UP 2009) 190–198.
[195] For a general criticism, NW Sage, 'Original Acquisition and Unilateralism: Kant, Hegel, and Corrective Justice' (2012) 25 CJLJ 119, 126–129.

change.[196] In this sense, policy arguments that override the *numerus clausus* do have a place in adjudication, although exceptional and unsystematic; and, in that regard, they are internal to the law.

What the Kantian argument adds to this picture is a conceptual limitation: if someone is allowed to create a property right due to its social convenience, then this ability must be available for all. Thus, when expanding the property system, judges must think beyond the effects of the case at hand. This also explains why judges are and should be reluctant to develop the property system: admitting new type of rights might shake the whole edifice of property law, and the casuistic nature of adjudication prevents judges from having complete view of the edifice.

(b) On legal change

This chapter has shown that the English and the German version of the principle of *numerus clausus* are not exactly underpinned by an aim to standardize property rights, but by the goal of standardizing them *in a precise manner*, namely, in a form that ensures that they impose as few as possible non-consented duties on third parties. Consistent with the optimal standardization thesis, new property rights are only admitted to the list when there are strong policy reasons for doing so, which is normally a choice to be made by the legislator.

On the assumptions that legislative activity in this field is infrequent, this makes property law look static and rigid. However, once it is acknowledged that the *numerus clausus* has an historical commitment to standardize property law in a manner that keeps broad spaces of freedom available, a different explanation emerges. Property law might be static, but it is not rigid, as its (internal) doctrinal structure is designed to allow private parties to accommodate new social and economic realities. In this view, property law does not change often, because *it does not need to change*. A first question is: how does this happen in practice?

[196] See Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (2nd edn, Transaction Publishers 2001) 73–114.

Further, acknowledging the role of policy arguments as normative justifications for the breach of this principle also provides property law with a principle of growth. The basic idea that parties shall not be subject to non-consented duties is not absolute and must, on occasions, yield to utilitarian considerations. In principle, this decision is for the legislators, but in practice both English and German courts have occasionally assumed this task. Thus, the second question is: why have these developments not altered the prevailing perception of property law as a static field?

Part III will answer both questions. First, it will show how, in practice, the English and the German *numerus clausus* provides property law with a structure that allows and facilitates private parties to accommodate new realities into pre-existing legal forms. Second, it will show the limits of this flexible structure, by discussing some cases in which the principle has been breached by courts or the list of property rights expanded by legislation.

Part III

Implications and Conclusion

CHAPTER 7

THE *NUMERUS CLAUSUS* AND TRESPASSORY LIABILITY

Part II has shown that in England and Germany property rights are characterized by their ability to bind third parties and that, in both jurisdictions, the principle of *numerus clausus* aims to contain such effects by standardizing them. As submitted in Chapter 6.4, the ultimate justification of such principle remains contested, but at least in English and German law, its direct or 'internal' justification seems to be the protection of the personal autonomy of third parties.

As explained in Chapter 3, in both legal systems property rights have two clearly differentiable third-party effects: successor liability and trespassory liability. Despite its analytically clear nature, in neither system has the distinction been widely explored. In Germany, Hübner and Riegner,[1] and Hermann Eichler[2] clearly identified the distinction in the mid 20th century, but it is rarely mentioned in contemporary literature, although the idea is sometimes used when discussing the third-party effects of leases.[3] In Anglo-American scholarship, Tony Honoré mentioned the distinction in the late 1950s, with a direct reference to Eichler's work.[4] Nonetheless, in the common law, the limits between both effects remained unexplored until James Penner re-introduced the distinction in the mid 2000s.[5] The distinction has since then gained traction in England, especially as an analytical device to distinguish equitable and legal property rights.[6]

As discussed in Chapter 6.3, in England, identifying the effects of the *numerus clausus* on trespassory liability has been of key importance in developing a conceptual

[1] Heinz Hübner and Joachim Riegner, *Sachenrecht* (Translatia 1948) 7.
[2] Hermann Eichler, *Institutionen Des Sachenrechts*, vol 1 (Duncker & Humblot 1954) 6–7.
[3] E.g., see Fritz Baur, Jürgen Baur and Rolf Stürner, *Sachenrecht* (18th edn, Beck 2009) 393–399.
[4] AM Honoré, 'Rights of Exclusion and Immunities Against Divesting' (1959) 34 Tul L Rev 453, 467.
[5] James Penner, 'Duty and Liability in Respect of Funds' in John Lowry and Mistelis Loukas (eds), *Commercial Law: Perspectives and Practice* (Lexis Nexis Butterworths 2006) 215.
[6] For example, Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1; William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (3th edition, OUP 2013) 180; Simon Douglas and Ben McFarlane, 'Defining Property Rights' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 240, 241.

justification of this principle based on the protection of party autonomy,[7] that makes its parallels with the German justification of the principle apparent. Nonetheless, the wider implications of this distinction for the *numerus clausus* remain underdeveloped. In England this seems to result from a lingering skepticism towards coining common law phenomena with civilian terms,[8] while in Germany the well-established conceptual status of the principle seems to have discouraged further developments.[9] In this line, theoretical accounts that aim to explain the flexible nature of standardized property rights, including Renner's functional transformation of property rights and Smith's Modular Theory, tend to overlook the importance of the distinction.[10] Part III will rely on this distinction to explain how the mandatory standardization of property rights provides flexibility to private law. This chapter addresses the case of trespassory liability arguing that, by limiting this type of liability, the *numerus clausus* not only protects the general liberty of strangers, but also the specific Hohfeldian liberty of owners (including the owners of other property) to functionally transform their property in light of changing social and economic circumstances.

7.1. The structure of trespassory liability

(a) Doctrinal elements

German doctrine and modern Anglo-American legal theory broadly conceptualize property rights by the power of a holder of such a right to exclude everyone else from a thing and the correlative duty of third parties to keep off. As shown in Chapter 3.2, in German law this is a straightforward outcome from their doctrinal structure. In this system, property rights are described as one specific kind of 'absolute right', namely an absolute right in a tangible thing, with 'absoluteness' meaning that such rights are

[7] See Ben McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' in Susan Bright (ed), *Modern Studies in Property Law*, vol 6 (Hart 2011) 311.
[8] E.g., see Malcolm Merry, 'Landmark Cases in Land Law (Review)' (2013) 5 Conv 455, 455–456.
[9] See 4.2 and 6.3.
[10] For both theories, see 1.4. and 1.5.

good against everyone.[11] In Anglo-American theory the path to reach the same conclusion is more cumbersome and only (re)emerged clearly with the conceptual revolution against the bundle of rights described in Chapter 3.3. In this context, James Penner argued that a property right is a right to exclude others from a thing based on the interest of its holder in using such thing.[12] This link between 'right to exclude' and 'liberty to use' (using Hohfeld's terms), might be less salient in German doctrine but it is not ignored: it is apparent in accounts of property rights as generic private law relations discussed in Chapter 3.2[13] and in the Hegelian underpinning of ownership mentioned in Chapter 6.3. For example, Eichler argued that property rights have an 'internal side' that enables the owner to act over the thing (*Einwirkungsmacht*) and an 'external' side, that empowers the owner to exclude third parties from it *(Ausschließungsbefugnis).*[14]

Despite this basic similarity, claim-rights protecting property holders against strangers have a remarkably different systematic position in German and English law. In Germany, the trespassory protection of ownership is made effective by duties imposed on all others[15] which result from three different clusters of causes of action: (pure) property claims, property claims with an obligational effect, and tort law claims.[16] The primary protection of property rights is provided by strict liability claims that are specific to property law (*dingliche Ansprüche*), including an action to recover the thing unlawfully possessed by a third party, i.e. a *vindicatio* (§ 985 BGB), and an action to prevent third parties disturbing the owner's use of the thing by means different than dispossessing her (§ 1004 BGB).[17]

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[11] See Hans Hermann Seiler, 'Einleitung Zum Sachenrecht' in Elmar Bund and others (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Sellier & de Gruyter 2007) 23; Reinhard Gaier, 'Einleitung Zum Sachenrecht' in Franz Jürgen Säcker and others (eds), *Münchner Kommentar zum BGB* (7th edn, Beck 2017) at 4, 11; Marina Wellenhofer, *Sachenrecht* (34th edn, Beck 2019) 2.
[12] See especially JE Penner, *The Idea of Property in Law* (OUP 1997) Chapters III and VI; JE Penner, *Property Rights: A Re-Examination* (OUP 2020) Chapter 7.
[13] E.g., see Karl Larenz and Manfred Wolf, *Allgemeiner Teil Des Bürgerlichen Rechts* (9th edn, Beck 2004) 228.
[14] Eichler (n 2) 6.
[15] For example, see Wellenhofer (n 11) 2.
[16] Seiler (n 11) 43.
[17] ibid 16–17; Gaier (n 11) at 7.

Even if it is seen as essential to understand the structure of German property law, the concept of a 'property claim' was not mentioned in the original text of BGB[18] nor the *Motive* and remains ill-defined in contemporary literature.[19] For disputes only concerning the physical recovery of things from unlawful possessors and injunctions against third parties otherwise disturbing the owner's use of the thing, these 'pure proprietary claims'[20] suffice, but in practice this is not enough. That is why the BGB also provides for 'statutory' or 'complementary' obligational claims (*gesetzliche Schuldverhältnisse* or *Begleitschuldverhältnisse*), regulating what needs to be handed over, in addition to the thing itself, once the owner has defeated the possessor in a *vindicatio* trial (§ 987 BGB).[21] In addition, German tort law provides a general protection for property rights against fault-based damage inflicted by third parties. According to § 823(1) BGB '*A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom,* ***ownership*** *or another right of another person is liable to make compensation to the other party for the damage arising from this*' (added emphasis). As discussed below, this provision only protects absolute rights (excluding personal rights), and German doctrine sees in this a key difference between property and personal rights. Following a textbook example, if a third party (X) damages the thing before title has passed from seller A to buyer B, the latter has no claim under tort law against X. Because B's (personal) right is only enforceable against A, such right cannot impose duties on X.[22] Nonetheless, this neat system is distorted in the case of land by the possessory protection of personal rights.[23]

In contrast, the common law lacks 'pure proprietary remedies' like a Roman *vindicatio*, yielding the bulk of the protection of property rights to the law of obligations, especially the law of wrongs.[24] As a consequence, in Anglo-American theory there is not much

[18] Since 2010 it is used, in the new versions of §§ 197 and 198 BGB.
[19] Seiler (n 11) 16–17.
[20] Using Peter Birks' words referring to the Roman *vindicatio*. Birks, Peter, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 KLJ 4–5.
[21] Seiler (n 11) 20.
[22] Wellenhofer (n 11) 2. For a similar example, Jan Wilhelm, *Sachenrecht* (5th edn, De Gruyter 2016) 49.
[23] See 7.3 (b).
[24] See Birks, Peter (n 20) 4, 6; Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart 2011) 9, both discussing personal property. For discussion, Nicholas J McBride, 'Vindicatio: The Missing Remedy?' (2016) 28 SAcLJ 1052. In land law this panorama is altered by the summary

doubt that tort law is the conceptual starting point to explain the third-party effects of property rights. For example, Penner holds that '*it is obvious that the law of property in a sense depends on the law of wrongs. (…) It defines the contours of the right to property, and it determines, in part, who has a property right*'.[25] Thus, from a conceptual and a practical perspective, the third-party effects of common law property rights are defined by civil wrongs resulting from the duty not to physically interfere with a thing. According to Penner's recent account, *'[t]hose duties are expressed in the tort law rules governing trespass, conversion, negligent damage, nuisance and so on*' and make up the *'Basic Property Norm*' for tangible property.[26] All these torts impose 'strict liability' on third parties, meaning that the defendant is liable for interfering with the plaintiff's rights regardless of her fault,[27] thereby imposing a broad duty on strangers consisting in not physically interfering with the owner's property.[28]

As in Germany, in England the access to tort law remedies is also one of the salient differences between property and personal rights: in principle, the holder of a mere personal right cannot sue a third party in tort.[29] English tort law is not structured in the systematic manner of the BGB, but the idea that a claim needs to be based on interference with an interest defined as an *in rem* right by the law is not completely alien to it. In *Allen v Flood*,[30] a case involving the claim of two shipwrights against a union that pressed their employer to dismiss them, the claim was rejected because the claimants did not suffer any damage relative to their '*mind, body, [or] estate*'.[31] Cave J acknowledged that the latter category, which can be '*substituted for "property"*

procedure for possession of land now incorporated into Rule 55 CPR. Note that the defendant in these cases is still referred to as a trespasser, suggesting that a tort is required. See Rule 55.1.(b) and *Secretary of State for Environment, Food, and Rural Affairs v Meier and another (FC) and others* [2009] UKSC 11 [8].

[25] Penner, *The Idea of Property in Law* (n 12) 139. Similarly, Henry E Smith, 'Property as the Law of Things' (2012) 125 Harv L Rev 1691, 1693.

[26] Penner, *Property Rights: A Re-Examination* (n 12) 16.

[27] Penner, *The Idea of Property in Law* (n 12) 139, 141. In cases of unintentional interference with chattels, 'fault' by the defendant is still needed. In English law, its precise meaning is contested, but it involves the defendant's failure to meet an objective conduct standard in relation to the foreseeable consequences relating to the claimant's chattel. Douglas (n 24) 141, 149, 168–170.

[28] Strict liability does not exclude the requirement of a mental state by the breacher, but it does not refer to the lawfulness of her conduct, only to her action. Douglas and McFarlane (n 6) 224–225.

[29] See Penner, *The Idea of Property in Law* (n 12) 141.

[30] [1898] A.C. 1.

[31] At. p. 29.

(…) is very general',[32] but the conceptual and practical resemblance with § 823(1) BGB is apparent. For example, in the landmark case *Hunter and ors v Canary Wharf,*[33] a dispute involving nuisance caused to London residents by the construction of the Canary Wharf Tower, the House of Lords granted damages for claimants holding property rights in land, but rejected the claims of those who only held licences. Similarly, in *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon),*[34] the modern leading authority for chattels,[35] a tort claim by a buyer (B) who had purchased goods that were carelessly damaged by the defendant (X) prior to the passing of title, was rejected because the claimant only had a contractual right to the goods, as in the German textbook example mentioned above, not a property right. However, as discussed below,[36] in English law this clear boundary between property and personal rights is distorted, once equity comes into the picture.[37]

(b) Tortious protection of contractual rights

In this framework, the role of the *numerus clausus* seems simple: a stranger (X) can only become liable for interfering with the right B acquired from A, when such right is contained in the list of property rights. Other rights, especially personal rights created by freedom of contract and, in England, (most) equitable property rights, are not protected against strangers by tort law. [38] However, this outcome is not absolute. In both Germany and England personal rights *might* deserve *some protection* against third parties under tort law. However, these cases are few and are subject to a high threshold, revealing that B's initial right is not protected in the same way as a property right.

In English law, the most apparent case is the tort of procuring a breach of contract, this is, the duty of X to refrain from inducing A to breach a contractual promise made

[32] Idem.
[33] [1997] AC 665, HL.
[34] [1986] AC 785.
[35] Douglas (n 24) 13.
[36] See 7.2 (b)ii.
[37] For example, Pill LJ's opinion in *Hunter*, arguing that beneficial rights of spouses should be protected against nuisance, [1996] 2 W.L.R. 348 (1995) 365.
[38] Swadling, 'Property: General Principles' (n 6) 180.

by A to B. Due to the limitation on its ambit by a conduct and a mental element,[39] the duty this tort imposes on X is different in nature from the one arising for A.[40] First, X's duty does not have the same content as it only consists in restraining from inducing A to breach A's contractual duty to B, but it does not impose on X the duty to fulfil A's obligation towards B. Following the example of the leading case in this regard,[41] when A promises to deliver an exclusive performance at a concert hall, X is only subject to a negative and ancillary duty to B consisting in not inducing A to breach such contract, for example by entering into a second contract with A. Second, the duty imposed on X requires a precise mental state, namely, to believe that her conduct will lead to the breach of A's obligation to B.[42] Closely linked to this, according to *OBG Ltd v Allan*,[43] this tort is dependent on an actual breach by A of its contractual duty owed to B. Therefore, this tort is said to only create an '*accessorial liability*', as it '*must be parasitic to a primary breach of contract'*.[44] Thus, despite providing contractual rights with a 'secondary protection' that Lord Hoffman described as implying treating *'contractual rights as a species of property which deserve special protection (…)*,[45] in England, this 'special protection' has been said not to undermine the distinction between personal and property rights.[46]

The situation is not that different in Germany. Since personal rights and abstract patrimonial integrity are not protected interests under § 823(1) BGB,[47] liability for inducing the breach of a contract can only be brought under § 826 BGB, which provides for intentional harm caused by a wrongful conduct *contra bonos mores*.[48] This provision has a wide objective scope that includes personal rights, but has very

[39] See Paul S Davies, *Accessory Liability* (Hart 2015) 132.
[40] Ben McFarlane, 'Equity, Obligations and Third Parties' (2008) 2008 Sing J Legal Stud 308, 315, 317; McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 7) 311.
[41] *Lumley v Gye* (1853) 2 E & B 216.
[42] See *OBG Ltd v Allan* [2008] 1 AC 1 [39], recently discussed by Lewison LJ in *Allen v Dodd* [2020] EWCA Civ 258 [11]-[37].
[43] See previous footnote.
[44] For example, Davies (n 39) 141.
[45] *OBG* [32]
[46] E.g., McFarlane, 'Equity, Obligations and Third Parties' (n 40) 317. Also see Ben McFarlane and Simon Douglas, 'Property, Analogy and Variety' [2022] OJLS forthcoming <https://doi.org/10.1093/ojls/gqaa043>.
[47] See 7.3.(a).
[48] RG, JW 1913, 866; RG, RGZ 78, 14, 17; BGH, NJW 1981, 2184; BGH, NJW 1994, 128; BGH, JZ 1996, 416.

strict subjective requirements. Courts resort to it only when the behaviour of the offender is especially improper, '*not simply unreasonable but actually unethical, really deplorable and disgusting*'.[49] Thus, to create tortious liability under § 826 BGB, the breach of the contract must be caused by conduct consisting in a lack of consideration incompatible with decency or with the basic requirements of a proper view of the law,[50] which is normally equated to intention to cause an unlawful harm.[51] Thus, as in the English case, the content of X's duty in relation to contractual rights under § 826 BGB is negative and ancillary, and can only be breached by fault-based conduct. However, different from Lord Hoffmann's argument seeing contractual rights as a 'species of property', in Germany, the protected interest is (arguably) good morals, not B's contractual right.[52]

From a comparative perspective, Tony Weir attributed this general similarity to the circumstances that neither German nor English law hold a defendant liable for pure economic harm caused by mere negligence to a person with whom the defendant has no contract.[53] However, at least from an historical perspective, the causality was the other way around. According to James Gordley, in both German and English tort law this rule is better explained as an outcome of a simple conceptualist (internal) argument developed during the 19th century: if X interferes with A's duty to B, the latter cannot recover from X because X owes no duty to B.[54] Accordingly, the similarity between both systems is best explained by this shared doctrinal structure, although the policy argument might be necessary to explain why X has no duty to B.

The strict requirements of the English tort of inducing breach of a contract and of § 826 BGB when applied to similar cases have a function akin to that of the *numerus clausus* of property rights: both limit the effects private dealings have on third parties. This also explains why it is normally so important to establish whether the interest held

[49] Tony Weir, *Economic Torts* (OUP 1997) 46.
[50] John Bell, André Jansen and Basil S Markensis (eds), *Markesinis's German Law of Torts: A Comparative Treatise* (5th edn, Hart 2019) 78–81, 85.
[51] Weir (n 49) 46.
[52] James Gordley, *Foundations of Private Law* (OUP 2006) 273.
[53] See Weir (n 49) 45.
[54] See Gordley (n 52) 270–280.

by the claimant qualifies as a right *in rem*. If it does not, the defendant will normally not be liable for the economic damage she caused to the claimant.

(c) Functional structure

Penner has characterized trespassory liability as a negative duty that *prima facie* everyone owes to the holder of a property right unconditionally of time and regardless of their position in respect to the owner. In Penner's own example, all others (X) have a duty 'not to interfere', 'keep-off' or 'leave alone' the things that are not their own.[55] In the US, using a Hohfeldian terminology that feeds into the Modular Theory, Merrill and Smith described the rights correlative to this duty as 'pure *in rem* rights', meaning cases where the duty holders are numerous and indefinite.[56]

It is important to note that the emergence of a conflict between B and X does not depend on X having or claiming a property right over the same thing as B: X's interference with B's right in the thing might or might not be backed by a claim of X's own property rights in the thing. In fact, frequently X has no pre-existing property claims to the thing or relies on her property in a different thing.[57] As shown in Chapter 8.1, this is a structural difference with successor liability, as these cases only arise when a third party (C) claims to have or have had, at the relevant moment, a competing property right over the same thing as B, typically acquired from A.

If property rights are explained through trespassory liability, a simple functional structure emerges: when A grants B a right in connection to a thing, if this right qualifies as a property right, then all others (X), regardless of their relation to A, B or the thing, will immediately come under a *prima facie* duty to B not to interfere with such thing. Thus, despite being a *stranger* to the AB dealing, X is bound by the right A conferred on B. The content of this duty is always negative and is typically made of three specific

[55] Penner, *The Idea of Property in Law* (n 12) 28, 73; Penner, 'Duty and Liability in Respect of Funds' (n 5) 215; JE Penner, 'Property', *The Oxford Handbook of New Private Law* (OUP 2021) 238.
[56] Thomas W Merrill and Henry E Smith, 'The Property/Contract Interface' (2001) 101 Colum L Rev 773, 784–785.
[57] For example, discussing the law of nuisance, the tortfeasor might be a non-owner. Penner, *Property Rights: A Re-Examination* (n 12) 145.

duties: not depriving B of her possession of the thing (e.g., § 985 BGB and the tort of conversion), not physically interfering with or disturbing B's use of the thing (e.g., § 1004 BGB and the tort of trespass); and not otherwise unreasonably physically interfering with B's enjoyment of the thing (e.g., §§ 1004 and 823(1) BGB and the torts of nuisance and negligence). Cases following this structure will be labelled 'ABX cases'.

For both Eichler and Penner, the most salient effect of trespassory liability is that it permits A and B to bind people they may have never seen, heard or known about. In other words, the ABX effect of property rights bind *complete strangers*. This is made possible because ABX relations are mediated through things, permitting people to interact through dealings that are not personal in any significant way. Thereby property law provides the basic framework for the general and impersonal practices upon which modern societies largely depend. For Eichler, the paramount importance of the impersonal nature of property rights is reflected in the vocabulary of German limited property rights: things are burdened (*Dinge werden belasstet*), not people.[58] In the Anglo-American context Honoré explains the same by describing a property interest as a right that cannot be divested by alienation of the property by another.[59] This feature of property rights plays a central role in Henry Smith's Modular Theory discussed in Chapter 1.5. According to him, property law organizes the world by packaging legal relations around useful attributes that tend to be strong complements. The property system defines these things by using what he calls an 'exclusion strategy' and then enriches the system using 'governance strategies', for more sophisticated relations.[60] In essence, Smith's basic exclusion strategy is trespassory liability explained by its function of lowering informational costs.

In this scheme, at first impression, the *numerus clausus* only plays the trivial function of identifying which of B's rights will have ABX effects. As discussed in Chapter 6, different arguments have been put forward to explain the deeper rationale that

[58] Penner, *The Idea of Property in Law* (n 12) 27, 30, 128; Eichler (n 2) 2–4.
[59] Honoré (n 4) 464.
[60] Smith (n 25) 1693–1694, 1709.

underpins the *numerus clausus*. Economic analysis normally emphasizes the efficiency gains achieved by limiting and standardizing property rights. However, these approaches often neglect that the *numerus clausus* also limits trespassory liability. In contrast, conceptual accounts tend to put the protection of X's liberty in the forefront. Building on this latter view, some elements of Smith's Modular Theory and the conclusions submitted in Chapter 6.4, the rest of this chapter will show how, by containing the ABX effects of AB dealings, the *numerus clausus* not only lowers transaction costs and protects X's liberty as a matter of principle, but facilitates the functional transformation of property rights.

7.2. England: *in personam* and equitable property rights *vis a vis* strangers

(a) The protection of innovative activities

A thorough assessment of the practical impact of a legal doctrine over time requires an historical approach that goes beyond the scope of this project. This thesis can only suggest how the *numerus clausus* might shape the operation of private law over time by discussing examples and developing arguments based on them. In the case of English law, this is facilitated by the rich casuistic reasoning of its law and the historical depth of its doctrine. In this specific case, this is further eased by a happy coincidence: the leading case discussing the impact of the *numerus clausus* in trespassory liability can be linked without field research to a well-known historical process, while another more recent landmark case dealing with the protection of interests in land is connected to an extensively documented urban development in London.

(i) From Georgian transport to Victorian leisure

In *Hill v Tupper*,[61] Mr. Hill (B) had acquired the exclusive right to hire out pleasure boats on a canal from a canal company (A). After Mr. Tupper (X), the owner of an

[61] (1863) 2 H & C 121, 159 ER 51.

adjacent pub, also started hiring boats out for pleasure, B sued X for damages. As discussed in Chapter 4.3, B's claim was rejected by Pollock CB holding that X was not bound by the right B acquired from A, because such a right is not a property right acknowledged by the law. In other words, even if the principle was not mentioned as such, the court refused to enforce B's right against X because it was not in the *numerus clausus* of property rights.

Within the boundaries of the case, Pollock CB's argument seems the narrow outcome of a formalistic doctrine, but its impact in preserving the flexibility of property rights becomes apparent as soon as the case is seen in its wider context. The canal involved in the dispute was built in 1794,[62] that is, during the second outburst of the British 'canal-mania' of the late 18th century.[63] The transformation of Britain's inland waterways during this age has been described as one of the most spectacular innovations of the first industrial revolution, due to its ability to provide high-capacity transport that was both reliable and low-cost.[64] By the time of *Hill*, the canal age was largely over, as the massive development of rail transport after 1825 had made Britain's inland waterways largely obsolete for trade.[65] In fact, the deal between the Canal Company and Mr. Hill seems to have been largely motivated by the company's attempt to replace its decaying transport business with the increasingly popular activity of pleasure boating.[66] In other words, while the changes triggered by the second industrial revolution made canals increasingly useless for trade, they also made them more appealing as leisure places for the new urban population of Victorian times, eager to spend their new free time and higher wages visiting the countryside.[67]

It is tempting to see Pollock CB's decision to deny the enforceability of Mr. Hill's right as a hurdle to the re-conversion of the canal into a leisure attraction. However, this would be a mistake. Mr. Tupper was the owner of a pub opened beside the same

[62] McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 7) 5.
[63] See Phyllis Deane, *The First Industrial Revolution* (2nd edn, CUP 1980) 78.
[64] ibid 78–80.
[65] See Mark Casson, *The World's First Railway System: Enterprise, Competition, and Regulation on the Railway Network in Victorian Britain* (OUP 2009) 2, 4, 31.
[66] See McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 7) 6.
[67] See Judith Flanders, *Consuming Passions. Leisure and Pleasure in Victorian Britain* (Harper 2006) 205–210, 216–219.

canal only three years before the deal between the Canal Company and Mr. Hill. Thus, by allowing the visitors of his pub to use his boats for fishing and bathing in the canal, Mr. Tupper was already playing a relevant role in adapting a canal from the Georgian period to the new reality of Victorian Britain. If Mr. Tupper had been found liable to Mr. Hill, the liberty of private parties to adapt their land to new circumstances would have been diminished, not increased: thanks to the freedom preserved by the principle of *numerus clausus,* there were more people (an indefinite number of Xs) with the liberty (as against B) to change the use of their land to satisfy the new leisure needs of a modern urban society.

It is worth stressing that the problem of enforcing the claimant's right in *Hill* does not seem to have been the creation of a monopoly over the use of the canal for pleasure boating, but the allocation of such monopoly to a person different than its owner. Discussing this case in the context of the operation of the *numerus clausus* in the law of easements, Lord Briggs recently argued that, even if the right to put pleasure boats in the canal had accommodated the land (one of the requirements of an easement),[68] suing for '*an infringement of it by another pleasure boat operator would had required the plaintiff to sue in his landlord's name as the owner of the canal'*.[69] This suggests that the problem of enforcing Mr. Hill's right against Mr. Tupper is that it would have separated the decision as to who can put pleasure boats on the canal from the ownership of the canal itself, including all other decisions over it, affecting not only Mr. Tupper and other strangers owning land adjoining the canal, but also the modular structure of the ownership of the canal itself. The implications of this type of arrangement, including the potential anti-commons scenarios, will be discussed in Chapter 8.

(ii) From 19th century trade to 21st century global finance

Hunter offers a contemporary example of the same mechanism. The Isle of Dogs was originally developed at the turn of the 19th century by the West India Docks Company

[68] *Re Ellenborough Park,* [1956] Ch 131, CA.
[69] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd,* [2017] EWCA Civ 238 [56].

to satisfy the pressing need for new port infrastructure in a period in which London was at the heart of global trade. The area boomed with business for the following one and a half centuries: Canary Wharf was the name of a dock built in this area in 1936 to serve the fruit trade.[70]

Despite massive investment in reconstructing the area after the Second World War, by the 1960s the future of London's up-river docks had turned bleak, due to the emergence of containers for cargo handling, changes in the patterns of world trade, its relative distance from the sea and the increasing competition from other British ports.[71] During the 1970s, as the individual docks started to close, the Isle of Dogs became one of the largest failing areas in the UK. Finally, in 1980 the whole area was shut down, turning it into a '*disconnected continent*' that looked '*dark and isolated*'.[72] The construction of the Canary Wharf Tower (officially, One Canada Square) during the late 1980s and early 1990s was the spearhead of a redevelopment project that made the area flourish again, this time not with trade, but with finance. In 2012 the Financial Times even reported that Canary Wharf was overtaking the City of London as the largest employer of bankers in Europe.[73]

The spectacular shift of the Isle of Dogs from abandoned 19th century trade port to 21st century financial services hub can obviously not be explained by *Hunter* alone, as other factors, including liberal zoning, subventions, tax benefits and the extension of public transport services, surely played a more decisive role.[74] Nonetheless, this case still played its part. By holding that only claimants having property rights were entitled to damages and denying actions to claimants who only held licences in the land,[75] the

[70] See 'The West India Docks: Historical Development', *Survey of London: Volume 43 and 44, Poplar, Blackwall and the Isle of Dogs* (Hermione Hobhouse 1994) <http://www.british-history.ac.uk/survey-london/vols43-4/pp248-268> accessed 9 December 2020.
[71] ibid.
[72] Moore Rowan, *Slow Burn City* (Picador 2017) 46, 49.
[73] ibid 49, 52.
[74] On the relevance of regulation, see Maria Lee, 'Hunter v Canary Wharf Ltd (1997)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Tort* (Hart 2010).
[75] The reasoning is more complex. Lord Goff held that a 'licensees with exclusive possession' would also be entitled to a tort claim (p. 692), which in turn seems to run against the basic authority holding that exclusive possession leads to a lease (*Street v Mountford* [1985] AC 809). Nonetheless, the holding seems to be pointing to the direct proprietary effect of direct exclusive possession (see Lord Hoffmann's opinion, p. 705-796), not to the personal rights of licensee.

House of Lords preserved important liberties of the developers as against licensees: if the residents-claimants (B) had been allowed to cluster actions based on property and personal rights, such claims would have effectivity 'cloned' the duties the developers (X) owed to those with property rights in the affected land. The court did not explicitly rely on the *numerus clausus* principle to avoid this end, but on the idea that '*nuisance is a tort to land*'.[76] Nonetheless, the decision is underpinned by the same principle: only parties holding a direct right in land, that is a property right, are protected against strangers (*in rem*).

The relevance of this principle in preserving the liberty of third parties might seem to fade away when the remedy sued for by B is an injunction, which is likely in nuisance cases.[77] In such scenarios, if a single claimant holding a property right succeeds in stopping X's activity, all other affected parties, including those not holding property rights, will benefit from the injunction. However, this does not really undermine the effect of the *numerus clausus*: only those holding property rights will be able to obtain an injunction. This imposes a structural limit on the number of Bs X will have to deal with, for example, for obtaining their consent via a 'Coasean bargain'. Thus, the 'freeride' that those not holding property rights might obtain from B's injunction is largely irrelevant for X liberty to functionally transform her land.

This rationale also addresses a common argument made against the *numerus clasusus*. In *Stockport Waterworks Co v Potter,*[78] the majority rejected the claim of B, who had acquired a right to use a waterway from a riparian owner (A), against a stranger (X) who had polluted the stream, holding that, as A had retained the riparian land and could not deal separately with the water right, only A had been wronged by X. Dissenting, Bramwell B criticized this view arguing that, if X committed a wrong against A by polluting the stream, there is no reason X should not also be liable to compensate B.[79] This suggests the following argument: if X is already barred from using its property in a certain way (e.g., polluting) as a result of a duty towards A,

[76] At 687.
[77] E.g., *Coventry v Lawrence* [2014] UKSC 13.
[78] (1864) 3 H & C 300, 159 ER 545.
[79] At 319.

enforcing B's right against X, does not take any new liberty away from X. This is not accurate, as allowing B to freeride on A's claim against X multiplies the right holders X must indemnify or deal with to achieve a 'Coasean bargain'.

(b) Accounting for the deviations

The basic idea put forward in the previous subsection is challenged by a few cases in which rights that are not within the closed list of property rights have been allowed to create trespassory liability, including personal rights and equitable property rights. On its face, this implies an open breach of the principle of *numerus clausus* as, according to it, personal and equitable property rights do not have the ability to bind trespassers. This subsection accounts for these deviations arguing that some are justified exceptions while others are simply wrongly decided cases. After briefly discussing the case of licensees in possession, this subsection will expand on cases involving equitable property rights, because these represent the most important challenge to the *numerus clasusus* principle in England.[80]

(i) Licence to occupy v licensee in occupation

As discussed in Chapter 3.3, a basic principle of English private law is that only property rights can bind third parties. This principle seems to have been openly breached in *Manchester Airport plc v Dutton and ors*.[81] In this case, the National Trust (A), the owner of a piece of land, gave Manchester Airport plc (B), and its subcontractors contractual permission to enter such land to carry out some works (*i.e.*, A gave B a contractual licence). Before B entered onto the land, a group of environmental protestors (X) occupied it, and B applied for an order of possession against X. Despite acknowledging that B had a purely personal right against A, the majority of the Court of Appeal decided to enforce B's right against X. The three judges sitting on this case agreed that if B had been in possession under the licence *before* X's interference, B could have brought the claim for possession against X. Building on

[80] See 4.3.
[81] [2000] QB 1333, CA.

this, the majority opinion delivered by Laws LJ argued that not extending this protection to the licensee not yet in possession was based on a '*false assumption*' and that the '*true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to (…) give effect to such (…) licence*'.[82]

Dutton has been met with heavy criticism for breaching the *numerus clausus* of property rights. According to Swadling,[83] by excessively focusing on making a remedy available to B, Laws LJ failed to notice that a contractual licensee in possession (B) has two different rights coming from different sources. The first has its origin in contract and entitles B to demand possession from the licensor (A), while the second comes from the fact of possession and grants B a property right which is therefore binding on strangers (X). Thus, commentators have argued that Chadwick LJ's dissent, which made this distinction, should be preferred. In their view, the same outcome could have been met by arguments consistent with the *numerus clausus*: B could have forced A to seek possession against X to comply with A's contractual obligation to B.[84] If the critics are correct, cases as *Dutton*[85] do not amount to a conceptual challenge to the *numerus clausus*, but only to a poorly reasoned case.

(ii) Trespassory protection of equitable property rights?

In principle, equitable property rights only bind successors in title,[86] not imposing duties on strangers that might restrict their freedom to use their property. For example, if A grants B an equitable lease in Blackacre, such rights might bind A's successor in title (C), but it does not impose any new duty on the owner of Whiteacre (X). However, case law evidences the existence of a handful of holdings that have allowed different forms of equitable property rights to bind strangers. This subsection discusses these

[82] At 149-150.
[83] William Swadling, 'Opening the Numerus Clausus' (2000) 116 LQR 354.
[84] Ben McFarlane, *The Structure of Property Law* (Hart 2008) 345, fn 22. Also see Oscar Han, 'Licensee versus Trespasser: Hill v Tupper Resuscitated' (2016) 6 Prop L Rev 87.
[85] The same reasoning was approved *in obiter* by Lord Neuberger in *Mayor of London v Hall and others*, [2010] EWCA Civ 817 [27].
[86] Swadling, 'Property: General Principles' (n 6) 180. Also see FW Maitland, *Equity: A Course of Lecture* (AH Chaytor and WJ Whittaker eds, 2 rev, CUP 1936) 169–170.

deviations, by distinguishing between cases that create true exceptions to the effect of the *numerus clausus* on ABX liability (i.e., the restrictive covenant) and holdings that seem better explained as wrongly decided cases (cases involving rights held on trust).

Restrictive covenants

As explained in Chapter 4.3, probably the main breach to the principle of *numerus clausus* in English law was the emergence of the restrictive covenant during the second half of the 19th century. By means of a case line that can be traced to *Tulk v Moxhay,*[87] the Court of Chancery developed a new equitable property right that facilitated the sale of, and release of capital from, urban land by enforcing negative duties regarding the use of land against successors in title,[88] and thereby permitting the seller to exercise some control on future developments.

However, the development of the restrictive covenant did not stop there. After the turn of the 20th century, in *re Nisbet and Potts Contract*,[89] the courts expanded the binding effect of the restrictive covenant beyond the natural ABC scope of equitable rights. The case concerned a piece of land transferred to X2 by a party (X1) that only had a possessory title to the land (this is, a squatter), without knowing that prior to her possession, the paper-title owner (A), had granted a restrictive covenant to another person (B). The court held that, even though A's title was barred by adverse possession, B could still enforce the covenant against X2, despite the latter not being a successor in title to the grantor of the covenant nor being aware of its existence. As a result, English doctrine acknowledges the restrictive covenant as an exception to the principle holding that equitable property rights do not have ABX effects.[90]

[87] (1848) 2 Ph 774, 41 ER 1143.
[88] Ben McFarlane, 'Tulk v Moxhay (1848)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart 2012) 204–211.
[89] [1906] 1 Ch 386 (CA)
[90] Swadling, 'Property: General Principles' (n 6) 180.

Nisbet has been said to be indefensible from a pure conceptual perspective.[91] The decision was subject to early criticism,[92] while contemporary English scholars arguing for the recognition of equitable property rights as a discrete category,[93] conceptually different from legal property rights and from personal obligations,[94] acknowledge that the trespassory effect of the restrictive covenant makes it difficult to accommodate in the category,[95] forcing them to treat it as 'a special case'.[96] In their view, the trespassory effects of the restrictive covenant can only be justified by its practical outcomes: the restriction is off-set by the increase in the amenity of the neighbouring land;[97] an argument already present in Cozen-Hardy LJ's opinion in *Nisbet*, who openly argued that the value of an estate in a city depends upon '*the continuance of the mutual restrictive covenants affecting the user and enjoyment of property*'.[98] For McFarlane, this does not imply that the decision is necessary a bad one, but that it is dangerous to rely on it to reach broader conclusions regarding the nature of equitable property rights.[99]

In Smith's Modular Theory, this utilitarian justification of the ABX effect of the restrictive covenant seems better captured by the basic exclusionary strategy. In order to reduce informational costs, this strategy divides the world into chunks and delegates the decisions over them to the owner, with exclusion from third parties.[100] In this case, the exclusionary rule protecting B's land is expanded to the land subject to the restrictive covenant in favour of B, thereby reshaping its property module. From B's perspective, this expansion makes sense: the covenant is highly complementary to her use of the land, but B, in practice, can only rely on this benefit if the covenant binds all third parties, including squatters. In the modern urban context, when B buys a part of A's

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91 See McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 7) 319.
92 E.g., Maitland (n 86) 166–167, 169–170.
93 See 3.3.
94 See McFarlane and Stevens (n 6); Douglas and McFarlane (n 6).
95 See McFarlane, 'Equity, Obligations and Third Parties' (n 40) 322, footnote 67.
96 See McFarlane and Stevens (n 6) 14.
97 McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 7) 319; McFarlane and Stevens (n 6) 14.
98 At 409.
99 McFarlane, 'Tulk v Moxhay (1848)' (n 88) 231.
100 Smith (n 25) 1693, 1694, 1702, 1703; Henry E Smith, 'Economics of Property Law' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 2: Private Law and Commercial Law* (OUP 2017) 149, 150, 159, 160.

land, B not only needs to be sure that A and A's successors (C) will not use the rest of the land for a particular purpose, but also that pure strangers (X) will be precluded from doing so. This certainty is evaporated if B cannot assert her rights against X. Thus, by allowing restrictive covenants to bind squatters, the law facilitates that parties deal separately with a piece of land pertaining to larger plot, allowing the purchaser (B) to functionally transform the separated piece and A to raise funds to functionally transform the section of the plot she retains.[101] Of course, this means X is not only liable towards A for trespassing on the land, but also towards B for breaching the restrictive covenant. This is justified by the benefits that this form of liability has for private urban development, this is, by a policy reason.

The effects of the restrictive covenant against squatters could also be accounted for in a different manner. Instead of justifying its exceptional effects in utilitarian considerations, one could argue that the oddity of this right lies in its source. From a conceptual perspective, restrictive covenants have a structure that is essentially the same as a legal interest in land. This becomes apparent in the attempts to categorize restrictive covenants and easements from a comparative perspective, as their civilian counterparts make one single category of servitudes.[102] That the restrictive covenant has more in common with legal rights than other equitable rights is apparent in the strange position it occupies among equitable property rights. According to English scholarship, equitable property rights fall in three groups: equitable versions of legal rights (equitable lease, equitable easement, etc.), beneficial rights held in trust and 'other equitable rights',[103] which do not really seem to have a conceptual unity. The need for a catch-all term to accommodate restrictive covenants within equitable property rights suggest that it does not have much in common with the rest of them. Indeed, the Law Commission has suggested that legislation should acknowledge that

[101] McFarlane, 'Tulk v Moxhay (1848)' (n 88) 228.
[102] See for example, Bernard Rudden, 'Economic Theory v. Property Law: The Numerus Clausus Problem' in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence. Third Series* (Clarendon 1987) 242.
[103] Swadling, 'Property: General Principles' (n 6) 180, 181.

covenants in freehold land operate as legal rights,[104] which would complete the transition of the restrictive covenant from purely personal to legal property right.[105]

If the foregoing is correct, what needs to be explained is not why restrictive covenants bind strangers, but why it remains an equitable right. Such reasons are not obvious and, certainly, cannot be based on the conceptual structure of the restrictive covenant. Thus, from the perspective of the practical operation of the *numerus clausus*, the restrictive covenant is better explained as a full member of the list: in English land law, the rights that have ABX effects are legal property rights and the restrictive covenant. This could be seen as the (almost) final stage of the process by which, pushed by policy reasons, the restrictive covenant passed from being a pure personal right, only binding A, to become binding too on successors in title (C), and finally, becoming entirely functionally equivalent to a legal property right by binding X, a path that resembles that of the lease.[106]

Beneficial rights under trusts

When Merrill and Smith put rights held in trust in the continuum between personal and property rights, they attributed the oddity of the rights to its quasi-multital effects, that is to the ability of beneficial rights to bind a small number of indefinite people, which essentially correspond to the successors in title of the trustee. From the perspective of tort law, they did not see any grey-area problem, as they relied on the general view that the right to sue in tort is exclusive to legal owners.[107] In the same line, when Penner distinguished between trespassory and successor liability, he held that the trustee has all the trespassory rights to the trust property, while the beneficiaries' rights are good only against successors.[108] Thus, a Hohfeldian analysis shows that the trustee (A) comes under a duty towards the beneficiary (B), while strangers (X) remain only bound to A. Consistent with this, A can declare a trust in favour of B without

[104] Law Comm No. 327, *Making Land Law Work: Easements, Covenants and Profits a Prendre* (2011).
[105] See McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 7) 320–321.
[106] See Simon Gardner, '"Persistent Rights" Appraised' in Nicholas Hopkins (ed), *Modern Studies in Property Law*, vol 7 (Hart 2013) 328.
[107] See Merrill and Smith (n 56) 846.
[108] Penner, 'Duty and Liability in Respect of Funds' (n 5) 216.

altering X's position. That is why, according to Douglas and McFarlane, there is no need for a *numerus clausus* of beneficial rights in trusts.[109] This does not imply that the beneficiary B is not protected against damage to the trust property, but only that the party entitled to sue in tort is the trustee and that the damages recovered from X will be held on trust for B.[110] The picture that emerges is that beneficial interests under a trust behave as obligations *vis a vis* strangers: X can ignore B's beneficial rights. Thus, since rights held in trust do not impose duties on strangers, there is no need to protect their liberty by having a closed list of beneficial rights. By the same token, the problem rights held in trust create for the *numerus clausus* are, primarily, a matter of successor liability (see Chapter 8.2).

However, this operation of the trust has been recently challenged in England by the Court of Appeal, forcing a re-evaluation of the meaning of the *numerus clausus* in this context. In *Shell UK Ltd & ors v Total UK Ltd* & *ors*,[111] the defendant (X)[112] damaged infrastructure held by two services companies (A) in trust for beneficiaries, including Shell (B). Shell sued X for the loss resulting from not being able to supply its clients. Relying on precedents that prevent beneficial owners from directly suing in tort for damage to the trust property,[113] the first instance court held that X did not have any duty of care towards Shell, as the latter did not hold legal rights in the infrastructure nor in the land where it was placed, describing the damage as pure economic loss,[114] which is not usually indemnifiable in negligence in English law.[115] Nonetheless, the Court of Appeal reversed this decision arguing that the precedent did not cover the case of a joint lawsuit by the beneficial and the legal owner and granted damages to Shell arguing that it would be 'legalistic' to deny compensation under the exclusionary rule. After acknowledging that such claims can only succeed if there is a 'special relation' that creates enough proximity between the defendant and person suffering the economic loss, the court found that beneficial ('real') ownership of the damaged

[109] Douglas and McFarlane (n 6) 240, 241.
[110] See *Lord Compton´s Case* (1568) 3 Leo 196; *Earl of Worcester v Finch* (1600) 4 Co Inst 85; *The Aliakmon* (n 34); *MCC Proceeds Inc v Lehman Bros* [1998] 4 All ER 675.
[111] [2010] EWCA Civ 180, [2011] QB 86.
[112] Also a beneficiaries under the trust, but that it did not make any difference to the analysis
[113] *The Aliakmon* (n 34).
[114] [2009] EWHC 540 (Comm) [518]-[520].
[115] James Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 LQR 66, 69.

property did give rise to such relation.[116] Permission to appeal to the Supreme Court was given, but the case was settled.

The reasoning of *Shell* has been met with criticism for both doctrinal and policy reasons. As to the first, the holding not only goes against precedents and overlooks the conceptual structure of the trust,[117] but is also internally inconsistent, as its treatment of Shell's damages as pure economic loss precisely assumes that Shell did not have any kind of property right in the pipes or the land.[118] Moreover, the reliance of the Court of Appeal on the existence of 'a special relation' allowing a derivative action against the defendant is also flawed, as the existence of a trust does not by itself create the 'special circumstances' that enable a beneficiary to sue directly in tort.[119] Thus, it is probably safe to disregard the challenge that *Shell* imposes on the *numerus clausus* by arguing that it is wrongly reasoned, especially since it did not reach the Supreme Court.

C*ontrario senso*, *Shell* also shows how a strict enforcement of the *numerus clausus* helps to keep property law flexible by preserving the liberty of strangers to deal with their own property. If private parties are allowed to freely create rights with trespassory effects, the indefinite liability such rights might impose on strangers will make it increasingly hard for everyone else to develop any new activity with their own property. This is apparent when the outcome of *Shell* is contrasted with *Hill* and *Hunter*, as in these cases, the limitation of the trespassory effects of B's rights was instrumental in enabling the defendants to continue with projects that served to functionally adapt their property rights to new realities.

[116] [136], [144].
[117] Edelman (n 115) 71.
[118] Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law. Text, Cases and Materials* (5th edn, OUP 2021) 192.
[119] William Swadling, 'In Defence of Formalism' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019) 109–110; Ben McFarlane, 'Form and Substance in Equity' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019) 205–206.

This raises an obvious question: how can a rule that preserves the liberty of X to damage B be justified?[120] From the perspective of Economic Analysis of Law, the answer would be simple: the rule is justified if the benefit to X exceeds the costs it imposes on B.[121] However, this is not the relevant issue here. The point of the *numerus clausus* is not that it allows X to efficiently damage B, but that it denies A and B the right to create a *new* and *additional* liability for X: she is already liable for damaging A's property. The *numerus clausus* is not aimed as a rule that allows X to be careless, but to prevent A from cloning its rights in favour of an indefinite number of Bs. In *Shell*, B could have also chosen to be the legal owner of the damaged site, but for good reasons it did not. B cannot have the benefits of the trust and at the same time have the rights of the legal owner.

The next section shows how these basic mechanics are replicated by German law. Due to the more systematic nature of German private law, this will provide a much clearer conceptual underpinning to the view advanced in section 7.2.

7.3. Germany: Personal rights *vis a vis* strangers

(a) The protection of personal freedom

Analysing the impact of the doctrine of *numerus clausus* in trespassory liability in German law presents different challenges. Whilst comparative lawyers see English tort law as a collection of separate wrongs developed by case law since the Middle Ages,[122] the German law of 'illicit actions' (*Recht der Unerlaubte Handlungen*) or 'law of delicts' (*Deliktsrecht*) is a consciously designed statutory system that entered into force at a precise moment in time (1900) and has not significantly changed since

[120] For example, in *Stockport,* discussed above.
[121] Moreover, in a world with no transaction costs, the initial allocation of the right to damage damaged would be irrelevant. See Ronald Coase, 'The Problem of Social Cost' (1960) 3 JLE 1.
[122] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 605.

then.[123] The manner in which German scholarship explains this system emphasises the exegesis of black-letter rules and accounts for its practical operation by the creation of stylized 'case groups' (*Fallgruppen*) which are discussed detached from its broader socio-historical context, making it harder to find the history-laden examples of English tort law. However, by the same token, German doctrine offers an explicit systematic account of the principles that underpin its tort law that is not readily available in England.[124] This explanation does not rely on the *numerus clausus* of property rights. However, this section shows how a property system made of a closed number of fixed property types ensures the wider flexibility of private law, complementing the English casuistic approach. This cross-fertilization is facilitated by the great resemblance between some German and English cases.

(i) The protection of freedom of action

As in other civilian systems,[125] the main aim of German tort law is indemnifying people who suffer damage caused by third parties.[126] However, this system also has the 'freedom of action' (*Handlungsfreiheit*) of strangers as one of its central concerns.[127] As mentioned in 7.1, the cornerstone of this system is § 823(1) BGB, which provides for a limited list of interests deserving protection against damage caused by fault-based conduct. This basic rule is supplemented by two general provisions with very narrow scopes, dealing with damage arising from the breach of a legislative norm intended to protect another person (§ 823(2) BGB) and intentional harm that breaches a legal-ethical minimum (§ 826 BGB).[128]

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123 This does not mean that there have not been legal reforms (e.g., the 1909 Unfair Competition Act, 1909 Road Traffic Act or 1959 Atomic Energy Act), only that they have nor altered its core.
124 On the different style of English and civilian tort law, Pierre Catala and John Antony Weir, 'Delict and Torts: A Study in Parallel - Part IV' 39 Tul L Rev 701, 781.
125 Gerhard Wagner, 'Comparative Tort Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 996.
126 See Johannes Hager, 'Das Recht Der Unerlaubten Handlungen' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 100; Hartwig Sprau, 'Unerlaubte Handlungen', *Palandt. Bürgerlicher Gesetzbuch mit Nebengesetzten* (80th edn, Beck 2021) 1410.
127 See Stephan Lorenz, 'Grundwissen – Zivilrecht: Deliktsrecht – Haftung Aus § 823 I BGB' [2019] JuS 852, 852.
128 Hager (n 126) 1191, 1192. For a general explanation in English, see Bell, Jansen and Markensis (n 50) 72–86.

From a comparative perspective, the manner in which German law defines the scope of protection of tort law has been seen as closer to the Anglo-American limitation of the duty of care than to the general clause of the other civilian systems, especially France.[129] From an historical perspective, this solution was a compromise between those who wanted a general liability clause similar to the original Art. 1382 of the *Code Civil* (today Art. 1240) holding that 'Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it'[130] and those who favoured a casuistic approach similar to the English. Its outcome reflects a conscious aim to avoid the judicial development of tort law and a deep scepticism towards the open-ended case law developed by the French judiciary under the general liability clause of the *Code*.[131] According to Gordley, this outcome is underpinned by a conceptual not a consequentialist argument: third parties can only become liable in tort for affecting an absolute right because only those rights are good against everyone: contractual rights cannot be violated by anyone other than the debtor. Thus, following Gordley, the protection § 826 BGB offers in cases of inducement of a breach of a contract is not explained by the unlawful violation of the claimant's personal rights, but by the violation of good morals.[132] After the entering into force of the GG, the narrow scope of German tortious liability gained a further constitutional underpinning in the general right to the free development of personality contained in Art. 2 GG.[133]

Due to this conscious design, even if this system is not explained from the perspective of property rights, contemporary German doctrine is very much aware of the tension that trespassory liability creates between the holder of a property right (B) and the freedom of strangers (X). For example, a leading *Kommentar* holds that, the more intense the protection tort law provides to the victim, the more the liberty of the

[129] E.g., see Wagner (n 125) 1005.
[130] Translation by John Cartwright and Simon Whittaker, available at http://translex.uni-koeln.de/601101/highlight_john_cartwright_simon_whittaker/french-civil-code-2016/, accessed 31 January 2022.
[131] Wagner (n 125) 1000; Bell, Jansen and Markensis (n 50) 16.
[132] Gordley (n 52) 272–273. He links this to a legislative discussion that I have not been able to trace.
[133] Lorenz (n 127) 852.

perpetrator is curtailed.[134] The BGB strikes this balance by allowing tortious liability only for the injury of well-defined legal interests: life, body, health, freedom and ownership (§ 823(1) BGB). The list also contains one open-ended term providing for the injury of 'other rights' *(Sonstige Rechte)*, but this does not mean that any right held by a person will be subject to protection. Leading *Kommentare* agree that only interests that share the absolute nature of the other rights in the list, that is, rights that have an exclusionary character (*Ausschließlichkeitscharakter*)[135] or function (*Ausschlussfunktion),*[136] deserve protection under this section. Indeed, on the one hand, the most salient examples of 'other rights' are limited property rights, property rights in intangible assets and personality rights; on the other, doctrine and case law consistently hold that relative rights and abstract patrimonial integrity are not protected by § 823(1) BGB.[137] Some textbooks even hold that this provision itself follows a *numerus clausus* rule,[138] although doctrine does not invoke the *numerus clausus* of property rights in this context.[139]

For German doctrine, the most salient outcome of this system is that, beside those exceptional cases that might arise under §§ 823(2) and 826 BGB, strangers are not subject to liability for causing 'primary patrimonial damage' to others,[140] which has been held to be broadly equivalent to the English treatment of pure economic loss.[141] As explained before, the exclusion of pure economic loss was not a consciously established policy of the drafters of the BGB, but emerged from case law after the entering into force of the Code, as a logical consequence of the conceptual structure of German tort law.[142] Cases confirming this are abundant. For example, an ice skater, whose partner suffers an accident that impedes him from skating with her, cannot

[134] Hager (n 126) 1191.
[135] Sprau (n 126) 1419.
[136] Hager (n 126) 1204.
[137] ibid 1419; Sprau (n 126) 1204, 1205.
[138] E.g., Karl-Nikolaus Peifer, *Schuldrecht. Gesetzliche Schuldverältnisse* (5th edn, Nomos 2016) 42–43.
[139] Case law mentioned in *Kommentare* and a review of the holdings contained in the Beck on-line data base available at the Institute of Advanced Legal Studies in London suggest that the *numerus clausus* is only invoked in ABC cases.
[140] See Sprau (n 126) 1410, 1419; Hager (n 126) 1191, 1192; Lorenz (n 127) 852, 854.
[141] E.g., Weir (n 49) 45; Wagner (n 125) 1008.
[142] Gordley (n 52) 272. See RG, 11 Apr. 1901, ERGZ 48, 114; RG 27 Feb. 1904, ERGZ 58, 24

obtain damages for the economic loss she experienced because they were not able to perform together.[143]

The line between what constitutes an injury to a property right and what only qualify as pure patrimonial damages is very fine. This is apparent when German doctrine discusses the so called 'cable cases' (*Kabelbruchfälle* or *Kabelfälle*).[144] In the *Hatching Eggs* case (*Bruteierfall*)[145] a stranger (X) damaged some electricity cables when cutting trees, interrupting the energy supply of an incubator and spoiling most of the eggs of the claimant (B). The BGH upheld the damage claim under § 823(1) because the spoiled eggs were within the ownership of the claimant. However, in another cable case,[146] a building company (X) conducting excavations on private land damaged some cables, interrupting the energy supply of a neighbouring printer (B). B sued for the damages caused by the interruption in its production, but the BGH dismissed the claim, arguing that B's ownership had not been injured. The similarity of the German cable cases with English landmark cases in the same field is striking. In *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd,*[147] a case involving the interruption of the energy supply to a steel company, the Court of Appeal reached the same basic outcome based on a very similar reasoning that distinguished the ingots that could not be processed (pure economic loss) from the ingots owned by the claimant that suffered damage because they were already in the melt when power was lost.

Due to the foundational decision of reserving tort law for the protection of absolute rights, in Germany, the duty not to damage the patrimony of another person can normally only arise within the context of contractual relations.[148] In practice, this means that A cannot give B a right that imposes a new duty on X, unless such right is either contained in the closed list of property rights or the correlative duty is accepted by X, converting it into an AB case. In this manner, German private law ensures that X

[143] See Hager (n 126) 1192, discussing BGH NJW 2003,1040.
[144] ibid 1201.
[145] BGHZ 41, 123. NJW 1964, 720.
[146] BGHZ, 66 388. NJW 1976, 1740
[147] [1973] 1 QB 27
[148] Hager (n 126) 1192–1193.

retains a broad freedom to do as she wishes, including the exercise of a Hohfeldian liberty over her property. Probably due to the neat structure of § 823(1), German law does not directly link this effect to the *numerus clausus* of property rights, but case law reveals reasoning that is underpinned by the same conceptual structure. For example, in a case in which the managing director (B) of a hospital was unlawfully fired by the parish (A) that managed the hospital due to the pressure of a group of its physicians (X) and could not later find a job, the BAG denied B's claim against X, arguing that the right to a workplace A owed to B was a relative right and therefore excluded from the protection of § 823(1).[149] This case has some resemblance to *Allen v Flood*,[150] as in such case the claim of the shipwrights (B) against the union (X) for pressing their employer (A) to dismiss them was rejected because B were hired on a day-by-day basis and, therefore, had no right at all that could be damaged by X.

This rationality is not limited to labour law cases. In the more recent *Gewinn.de* case,[151] the claimant (B) acquired from the German Internet Domain Administrator (A) the right to use a certain domain. Later, the domain ceased to be listed under B's name and was registered by the defendant (X). B sued X requesting to be reinstalled in the domain, but the BGH denied the claim, arguing that the holder of an internet domain only has a relative right against A and therefore cannot enforce its rights against X. Thus, as in *Hill*,[152] despite not making an explicit link to the *numerus clausus* principle, by limiting tortious liability to violation of absolute rights, these cases show how the very structure of German tort law ensures that, withing the general framework of the law, X retains a broad liberty to do as she wishes, including the general liberty to act upon her property, not having more duties than those arising from her own will or from the closed list of property rights. In this manner § 823(1) BGB seems to operate in a fashion similar to *Allen v Flood*.

[149] BAG, NJW 1999, 164.
[150] See n 30 and accompanying text.
[151] BGH, I ZR 187/10.
[152] One can assume that the domain registration was intended to be exclusive.

(ii) Implications

Once the effect of the *numerus clausus* in trespassory liability is clearly identified, the significance of the deviations from it come under a different light. For example, as discussed in Chapter 4.3., German doctrine tends to see the judicial creation of security ownership as one of the most relevant breaches of the principle of *numerus clausus*. In a transfer for security purposes (*Sicherungsübeignung*) B transfers its full ownership over a specific (normally) moveable asset to A by means of constructive delivery (*constituto posessiorio*), with B retaining 'possession for another' (*Fremdbesitz*) and A acquiring 'indirect possession' over it (*mittelbarer Besitz*). Thus, on one side, under the rules of property law, A becomes the full owner of the thing thanks to the constructive delivery and, on the other, A also comes under a purely contractual obligation towards B to only exercise such ownership to sell the thing if B defaults and only for the purpose of covering the outstanding debt, giving rise to a case of *Treuhand*.[153] However, despite only holding a personal right against A, B might enforce its 'indirect right' to the thing against third parties in two scenarios. The first are cases in which other creditors of A (C) want to enforce their rights over the asset B transferred to A for security purposes. When these creditors enforce their rights over the individual thing transferred by B for security purpose to A (*Einzelzwangsvollstreckung*), courts have held that A is still bound by its agreement with B, implying that B can prevent the creditors from selling the thing to satisfy their debts under § 771 ZPO, thereby authorizing B to enforce 'its indirect right on the thing' against third parties. Similarly, if A becomes insolvent (*Insolvenzverfahren*), B can directly claim the thing under §§ 47 and 51 InsO, as long she has not defaulted on the secured transaction.[154] A second group of cases are those in which A breaches its duty towards B and sells the thing to a third party (C). In these cases, B *might* be able

[153] See Carsten Herresthal, 'Das Recht Der Kreditsicherung' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 695–702; Sebastian Herrler and Hartmut Wiecke, 'Sachenrecht', *Palandt. Bürgerlicher Gesetzbuch mit Nebengesetzten* (80th edn, Beck 2021) 1619–1622.
[154] Wilhelm (n 22) 1091–1093, describing both cases. See also Herrler and Wiecke (n 153) 1622.

to claim damages from C under § 826 BGB, if the latter had knowledge of the AB agreement.[155]

In none of these scenarios does the AB dealing create a new duty upon a stranger (X) who might become liable for breach without fault. In the first group of cases the AB dealing does not impose any new duty on the creditors, who only lose the chance to sell one of the assets in A's patrimony to repay their credit.[156] The significance of this should not be overstated. When A is not insolvent, the creditor might proceed to sell any other of A's assets and when A is insolvent, B can only recover the thing if she has paid her debt to A. As to the second case, in principle, strangers (X) are not encumbered by B's right in the goods transferred to A for security purpose. As with the English trust, in principle only A's property right exists for X. The only exception to this is the possible liability of X under § 826 BGB, but as discussed above, this is a very low intensity duty that responds to a different rationale. Thus, from the perspective of trespassory liability, security ownership does not really seem to breach the *numerus clausus* of property rights. Thus, when adapting their property to new circumstances, strangers do not need to mind non-consented duties arising for them as a result of security transfers. The real significance of security ownership as a property right 'outside the *numerus clausus*' is found in its ability to bind successors in title, discussed in Chapter 8.3.

(b) The impact of possession

This general exclusion of trespassory liability for personal rights, is distorted by the role that possession plays in German property law. The nature of possession has been said to be one of the most radical differences between civil and common law systems.[157] Briefly, different to common lawyers who tend to equalize possession with

[155] BGH NJW RR, 1993, 367.
[156] For example, the RG ruled security transfers over whole deposits and inventories of changing goods invalid. See Werner Schubert, 'Die Diskussion Über Eine Reform Des Rechts Der Mobiliarsicherheiten in Der Späten Kaiserzeit Und in Der Weimarer Zeit' (1990) 107 ZRG Germ Abt 132, 142–145. Currently, the viability of these this general guarantees is seen, at least, as 'problematic' as a result of the difficulties in identifying the goods. E.g, Herresthal (n 153) 697.
[157] E.g., Gordley (n 52) 47–51.

title,[158] civilian lawyers see possession as a mere fact that does not *per se* give any right to the possessor of a thing;[159] although they also acknowledge that it is a factual circumstance which might have relevant legal implications. In the case of Germany, the factual nature of possession (*Besitz*) is seen as positively recognized in § 854(1) BGB, which holds that possession over a thing is acquired through the exercise of actual power over it. Such possession is different from ownership and does not amount to a property right.[160] However, the possessor of a thing still enjoys a certain level of protection against third-party interference that is independent of her having title to the thing (see §§ 858 to 864 BGB). In particular, § 858 BGB protects the possessor from non-consented deprivations or disturbances of her possession.[161]

The protection property law provides to possessors *regardless of title* has led to possession being considered one of the 'other rights' protected under § 823(1) BGB.[162] This raises a problematic question: if possession is only a fact (and not a right), why should it be protected? The nature and extent of this protection is highly contested[163] and there is no agreement on whether protection is provided to possession or to the right to possess,[164] nor on whether the unlawful possessor is also entitled to such protection.[165] Nonetheless, it is generally accepted that a possessor with no title who can use the thing in a manner similar to the owner is entitled to protection under tort law.[166] For example, based on his possession of a rented flat, the BGH allowed a tenant (B), who only holds a personal right against the landlord (A), to recover

[158] ibid 50–51.
[159] Safe for first possession, see § 958 BGB.
[160] In the context of property law: Herrler and Wiecke (n 153) 1537; Fabian Klinck, 'Sachenrecht' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 1278–1279, 1306–1307; in the context of tort law: Wolfgang Fikentscher and Andreas Heinemann, *Schuldrecht. Allegemeiner Und Besonderer Teil* (11th edn, De Gruyter 2017) 930.
[161] In this context, Dieter Schwab and Martin Löhnig, *Einführung in Das Zivilrecht* (20th edn, CF Müller 2016) 140–141. In general, Herrler and Wiecke (n 153) 1541–1545; Klinck (n 160) 1289–1303.
[162] Klinck (n 160) 1306, 1307; Wellenhofer (n 11) 64; Schwab and Löhnig (n 161) 140. For an explanation in English, see Bell, Jansen and Markensis (n 50) 37.
[163] Schwab and Löhnig (n 161) 141.
[164] Lorenz (n 127) 854.
[165] Fikentscher and Heinemann (n 160) 930.
[166] See Sprau (n 126) 1419; Lorenz (n 127) 854; Hager (n 126) 1206; Fikentscher and Heinemann (n 160) 930; Schwab and Löhnig (n 161) 141. For an explanation in English, see Bell, Jansen and Markensis (n 50) 37.

damages under § 823(1) BGB from another tenant (X) whose construction activity negatively affected B's medical practice.[167]

This has far-reaching consequences for the structure of German private law. Although doctrine does not state it in this manner, from a functional perspective, even when B's possession is based on a mere contract with A, her possession will be protected against strangers (X). For example, shortly after German re-unification a *Gemeinde* of Saxony hired an architecture firm to redevelop a site into an industrial park, which in turn sub-contracted execution of the works to a building company *(Building Company case)*. [168] The day the works were scheduled to begin, protestors blocked the access of the builders to the site. The BGH granted damages to the building company under § 823(1) BGB arguing that it was in rightful possession of the site.[169] This case has an obvious resemblance with *Dutton*, but some relevant distinctions must be made. In English law, possession gives a property right to the possessor. According to Chadwick LJ's dissent, in *Dutton*, the problem was that the claimant had not yet entered in possession and, therefore, could not *yet* have a property right. By contrast, in German law, possession is not a subjective right nor gives the possessor any property right until the prescription term has elapsed and, in the case of land, the possessor's right must also be registered.[170] Thus, in the *Building Company case* the BGH did not argue that the claimant had or was entitled to a property right because of its possession, but relied on the direct protection of possession of the land *as a fact*.

From the perspective of the division between relative and absolute rights, probably the most salient effect of the possessory protection of the non-owner arises in the context of leases. As discussed in Chapter 3.2, in German law, leases only provide the lessee (B) with a personal right against the lessor (A) to obtain possession, which is enforceable against A's successors in title (C). However, once B enters in possession,

[167] BGH, JZ 1954, 613, discussed by Eberhard Wieser, 'Der Schadensersatzanspruch Des Besitzers Aus § 823 BGB' [1970] Juristische Schulung 557.
[168] BGHZ 137, 89.
[169] From the account of the facts in the holding it is not clear whether the building company was already in possession of the site, but the reasoning of the court seems to have assumed that it was.
[170] Ownership is not acquired by possession, but by *usucapion*. See § 927 BGB for land and § 937 BGB for movables.

B's relation to the land becomes protected under § 823(1) BGB, making her position 'absolute' and, therefore, binding on strangers (X).[171] From a functional perspective, this brings the position of the German lessee closer to the English leaseholder: after entering in possession, she is also protected against strangers. Nonetheless, as explained below, the (doctrinal) justification for this protection is not based on the proprietary nature of possession, at least not directly.

The impact that possessory protection has on the number of people who are bound by B's rights seems a massive erosion to the German version of the *numerus clausus*: once the holder of a relative right (B) enters in possession, all strangers (X) become bound. However, German doctrine does not see in this a breach of the *numerus clausus*.[172] To a certain extent this can be explained by the overlap of the values safeguarded by the *numerus clausus* and by the protection of possession as a fact. This cannot be explained without accounting for the (unclear) position that possessory protection has in German law. The conceptualist approach that underpins civilian systems defines the owner as a person with the right to use a thing as she wishes. In this view, the owner has the right to possess. The implicit outcome is that possessors without ownership are persons without a proprietary right to possess. At least since the 19th century, this has led to an unsettled debate as to why bare possessors deserve protection. One position, normally associated with Jhering, bases this protection in ensuring the continuous access of the possessor to the thing as its most probable owner. This, so called, 'Personality' or 'Continuity Theory' (*Persönlichkeits-* or *Kontinuitätstheorie*) was the leading position during the 19th century and was supported by the Pandectist scholars who drafted the BGB. However, following Savigny's 'Peace Theory' (*Friedenstheorie*), nowadays the majoritarian view grounds the protection of possession in keeping social peace and avoiding private violence.[173]

This debate cannot be analysed here but is worth noting that neither of the two views provides a reason to protect possessors 'as such'.[174] At least from a conceptual

[171] See Schwab and Löhnig (n 161) 141.
[172] At least, the reviewed *Kommentare* and textbooks do not raise the point.
[173] See Klinck (n 160) 1288–1290; Gordley (n 52) 53–58.
[174] Gordley (n 52) 57.

perspective, this is a relevant difference with English law. Because the protection of the lessee under §823(1) BGB is presented as derivative from the general protection of possession, this might shed some light on the situation of the *numerus clausus*. According to the Peace Theory, the trespassory protection of the lessee is not grounded on making her personal right against A proprietary, but in the general social interest of protecting *any* possessor from the private violence of strangers, including purely contractual tenants. Following the Personality or Continuity Theory, this protection could be seen as mere manifestation of the general duty not to interfere that strangers owe to the (most probable) owner. From the perspective of the *numerus clausus*, this suggests that the trespassory protection of the lessee in possession does not aim to create a new and additional duty on strangers, but to protect *the thing*, regardless of whether it is possessed by the owner or by someone having a purely contractual right to possess derivative from that of the owner. This idea is reinforced by the doctrinal structure of possession in Germany. When owner A gives B a personal right to possesses her thing, strictly speaking, possessory rights are not cloned but functionally divided: A retains 'indirect possession' (*mittelbarer Besitz*) in the object, relevant for *usucapio,* while B is in 'possession for another' (*Fremdbesitz*), which entitles her to file injunctions to protect or recover her possession from strangers under §§ 858 to 863 BGB.[175] Hence, the possessory protection of the lessee does not seem to multiply duties on X. What this 'functionally divided possession' implies for claims under § 823(1) BGB -in particular, to what extent X interference with the thing makes her liable to A or B- requires in-depth research in German tort law that is beyond the possibility of this thesis. However, considering the broad functional and ideological similarity underpinning the limitation of the scope of trespassory liability in English and German law, it would not be surprising that the German outcome would be similar to the English.

[175] Klinck (n 160) 1316.

7.4. Conclusions

As discussed in Chapter 4.1, comparative research argues that the principle of *numerus clausus* has different degrees of stringency across jurisdictions,[176] especially once Anglo-American equitable property rights come into the picture.[177] This chapter suggests that such a conclusion might be inaccurate, as it does not pay sufficient attention to the different effects that property rights have on third parties. Although German doctrine does not link it to the *numerus clausus* of property rights and English scholarship has only recently started to explore this relation, this chapter has shown, that in both jurisdictions, if the analysis is restricted to trespassory liability, from a functional perspective, this principle has very stringent effects on the creation of new duties upon strangers. Despite some minor deviations that can be accounted for, ABX liability can only be created in the cases foreseen by the law: private parties cannot create new ABX cases based on contractual freedom.

The restriction that the *numerus clausus* imposes on the contractual creation of trespassory liability ensures that property law remains stable and flexible at the same time. From this perspective, the key is in limiting the cases in which X will become liable to B to (i) cases where B has a recognised property right; and (ii) standardized low-intensity duties. However, the protection that the *numerus clausus* gives to X is partially underpinned by the same rationality of the protection that trespassory liability provides to B. For example, in the case of nuisance, Nolan argues that this tort aims to keep B's land 'usable'.[178] In a similar fashion, by limiting the liability of the tortfeasor (X) *vis a vis* B, the *numerus clausus* ensures that X will be able to use X's own property (and the property of any other party) without incurring liability to an indefinite number of parties. Thus, thanks to this principle, A and B cannot take a liberty from X, unless in the limited cases and in low intensity forms authorised by the law.

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[176] E.g., see Bram Akkermans, 'The Numerus Clausus of Property Rights' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 105, 106.
[177] See Peter Sparkes, 'Certainty of Property: Numerus Clausus or the Rule with No Name?' (2012) 20 Euro Rev Priv L 769.
[178] Donal Nolan, 'The Essence of Private Nuisance' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law*, vol 10 (Hart 2019).

To a large extent this seems nothing else than a piece in the internal legal machinery of the exclusionary strategy of the Modular Theory (i.e., the concentration in one person of a bulk of complementary uses of a thing). However, the implications of the *numerus clausus* go beyond this. The Modular Theory has the lowering of informational costs as its main concern. Nonetheless, the limits that the *numerus clausus* imposes on private dealing also prohibit A and B from changing the structure of A's module, at least *vis a vis* all Xs. Despite rare cases that respond to a different rationale as the cases of inducement of the breach of a contract, this implies that X's freedom is effectively protected by the *numerus clausus*, including her liberty to act upon her property according to the circumstances. By this means, the *numerus clausus* ensures that 'functional transformation' of property rights identified by Karl Renner as instrumental to the shift from an agricultural to an industrial economy in the 19th century[179] remains in operation in the 21st century.

The internal rationale of these systems is well explained by the systematic style of German doctrine, while its practical effects are better accounted by the historically loaded English case law. According to German doctrine, limiting tort law claims to the protection of a closed listed of well-defined interests is central to protecting the 'freedom of action' of the general public, while English case law of the mid 19th and the late 20th century reveals how this facilitates the 'functional transformation' of old property rights by private parties.

A key element of this system is that it works 'through the thing'. Due to the very concept of a property right in German law and the rise of the thing-based concept of property in Anglo-American theory, this might sound obvious, but its implications have not been fully developed, especially in a comparative context. In England, the doctrine of relativity of title seems to make possession the ultimate reason for the direct protection of B's right over the thing against X. In German law, the same effect is achieved by the protection of possession *as a fact*, even if its justification remains unsettled. The implications of this are twofold: on the one hand, X does not need to know whether

[179] Karl Renner, *The Institutions of Private Law and Their Social Functions* (Agnes Schwarzschild tr, Routledge and Kegan Paul 1976).

things are owned by A, B1 or B2. If things are not hers, she simply must stay off them.[180] On the other hand, this also protects X. As things cannot be subject to multiple competing possessions at once,[181] at any point in time, only one party can be in possession.[182] Thus, the mediation of ABX liability through possession of things imposes a structural limitation on the number of parties that can have a claim against X. Other limited property rights, not dependent on possession (e.g., servitudes), follow a different rationale. The cloning effect of these rights is limited by controlling their content.

The resulting mental image is that of the *numerus clausus* acting as a firewall that protects X from the effects of AB dealings. This firewall ensures that, some low-intensity duties aside (e.g., liability for procuring a breach of contract), X will not be subject to new additional duties (or liabilities) that restrict her freedom, other than those arising from a limited set of clearly identified rights, justified by well-thought out policy considerations, normally decided by the legislator giving consideration to the general operation of the system. In England, this *numerus clausus* is made of legal property rights and restrictive covenants; while in Germany, where the list is built differently, it compromises property rights and possession, as one of the 'other rights' mentioned in § 823(1) BGB.

[180] Penner, *The Idea of Property in Law* (n 12) 75–76.
[181] This is straightforward in Germany. See Klinck (n 160) 1284. In England this is more complex, but a similar picture emerges from co-ownership of land: a legal estate can only be held by co-owners in joint tenancy, which is defined by the unity of possession. Tenancy in common in land can only exist behind the trust curtain (s 1(6), 36(2) LPA 1925).
[182] This party can be made of more than one person, as when A and B have a joint right to exclusive possession: see e.g. *Antoniades v Villiers* [1990] 1 AC 417 (HL).

CHAPTER 8

THE *NUMERUS CLAUSUS* AND SUCCESSOR LIABILITY

The basic effect of successor liability is that older property rights bind subsequent acquirers of rights in the same thing. As explained in Chapter 3, the conceptual place of successor liability in German and English law is different. In the former, the impact of B's property right on A's successors in title (C) does not play a relevant role in accounting for the nature of property rights, as this is seen as a self-evident outcome from their absolute nature. In contrast, in England, successor liability is at the heart of the doctrinal concept of a property right, evidencing an odd disconnection with the emphasis Anglo-American property theory places on trespassory liability for the same purpose.

This chapter will discuss the impact that the *numerus clausus* has on the contractual creation of successor liability, regardless of how it is labelled. It puts forward three main ideas: first, that the substantive form in which the *numerus clausus* standardizes English and German property rights provides property law with a doctrinal structure that is inherently capable of accommodating new realities; second, that in neither jurisdiction does the *numerus clausus* control all cases of successor liability, providing further (although limited) space for party autonomy; and third, that what private parties and judges can achieve through the functional transformation of modular property rights has limits, making the legislative creation of new modules of property necessary in certain contexts.

8.1. The structure of successor liability

(a) Doctrinal elements

In German law, successor liability seems extremely straightforward: older property rights simply take priority over newer rights (e.g., § 879 BGB).[1] Due to the basic 'publicity principle' (*Publizitätsgrundsatz*) that underpins all of German property law,[2] in land law, this temporal priority is normally easy to establish as ownership transfers are subject to registration in the Land Book (*Grundbuch*) and limited property rights can only be granted by registration in it (§ 873(1) BGB).[3] So, whoever (C) acquires a piece of land is subject to the property rights her predecessor (A) gave to third parties (B), or in technical terms, to the 'real rights that burden the land'. In the case of moveable property, when registration is not available, the publicity principle is normally satisfied by possession (see § 929 BGB),[4] which is why under the original design of the BGB, goods could only by pledged by handing them over (§ 1205 BGB).[5]

In this context, the real puzzle that successor liability poses to the German version of the *numerus clausus* arises from a few borderline cases. First, as shown in Chapter 3.2, despite not being a property right, under § 566 BGB, the lessee of immovable property (B) acquires from the lessor (A) a right that is enforceable against successors in title (C). Second, as discussed in Chapter 4.2, when B legally transfers ownership over a moveable asset to A with the sole purpose of securing a loan, B's interest in the thing might be enforced against A's creditors and successors, despite not being a legally acknowledged property right. Because both cases are seen as exceptions, German doctrine has not felt pressed to develop a property concept that accounts for them. If anything, both are more frequently explained as personal rights with third party

[1] See Marina Wellenhofer, *Sachenrecht* (34th edn, Beck 2019) 258–259, 283, 244.
[2] Fritz Baur, Jürgen Baur and Rolf Stürner, *Sachenrecht* (18th edn, Beck 2009) 168, 170.
[3] Wellenhofer (n 1) 246, 261; Fabian Klinck, 'Sachenrecht' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 1355.
[4] Wellenhofer (n 1) 27; Klinck (n 3) 1274.
[5] Carsten Herresthal, 'Das Recht Der Kreditsicherung' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 665–666.

effects,[6] thereby placing the need for justification in the law of obligations. Thus, in Germany, rights with ABC effects are regarded as essentially the same as those with ABX effects, making successor liability appear as an obvious effect of the absolute nature of property rights. Accordingly, successor liability tends to be absolute, meaning that it binds all successors, without having an elaborate priorities system that creates fine-grained exceptions to the basic temporal criteria.

English law is less straightforward. From a technical perspective, this arises from two different sources: equitable property rights and statutory priorities. However, this complexity is underpinned by a subtle but essential conceptual difference with German law. In English doctrine, the ability of property interests to bind successors does not imply that such rights will always bind third parties, but only that they *prima facie* will. The most notable example is the rights of the beneficiary of a trust: in general, if A conveys a legal property right she holds in trust for B to C in breach of the terms of the trust, B will not be able to recover from C if C acquired the right in good faith, for value and without actual, implied or constructive notice of the breach.[7]

In land law, priorities add an additional complexity.[8] Not that different to German law, the starting point of English law is that the first right in time prevails (e.g., s. 28 LRA 2002).[9] However, in registered land, successors have two relevant defences against pre-exiting property rights that, in practice, make this principle far less decisive. The first is inbuilt in the registration system. Under s. 29 LRA 2002, a registrable disposition of a registered estate made for a valuable consideration is not affected by previous unregistered interests, which in practice brings the operation of the English Land Registry closer to the German Land Book, especially as the entrance of a notice for rights under a trust is not admitted (see s. 33(a)(i) LRA 2002).[10] However, C cannot rely on this defence when B has an 'overriding interest', including, for example, a legal

[6] See n 25.
[7] William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (3th edition, OUP 2013) 213. Also see *Pilcher v Rawlins* (1872) 7 Ch App 259.
[8] The same is true for movable property. See Richard Calnan, *Taking Security* (4th edn, Lexis Nexis 2018) Chapter 8.
[9] For movable property, see ibid [8.17].
[10] Although entry of a restrictions is possible (s. 40 LRA 2002)

lease for seven years or less (Sch. 3, Para. 1 LRA 2002)[11] or property rights held by a party in actual occupation (Sch. 3, Para. 2 LRA 2002). The second exception comes from general property law: ss. 2 and 27 LPA 1925 enables C to acquire registered and unregistered land free from most pre-existing equitable interests, especially beneficial interests under trusts, provided that certain requirements as to the payment of any capital money are met ('overreaching').

At a doctrinal level, these defences make successor liability in English and German land law very different. When the analysis is restricted to those rights that each system labels as 'property rights' the following picture emerges: in Germany, property rights in land can only be acquired by registration and are always binding upon successors. By contrast, in England, registration is not always required for the acquisition of a property right in land and, under certain circumstances, non-registered interests, both legal and equitable, can also bind successors. However, if German law is seen from a pure functional perspective that considers all rights that might have ABC effects, regardless of the way they are classified by doctrine, it becomes apparent that successors can also be bound by interests that are not part of the *numerus clausus* nor subject to registration, including leases in land and non-possessory pledges. Hence, due to the more stringent effect that the *numerus clausus* has in trespassory liability,[12] both systems admit some interests that are capable of binding successors but that, normally, do not have ABX effects, at least nor *per se*.[13]

Due to the different conceptual starting points that English and German doctrines take to the concept of a property right, this similarity has not been highlighted enough in comparative law. In England, rights with pure ABC effects are seen as a part of property law and form a self-standing analytical category that needs to be explained. To a large extent this is an effect of Equity.[14] Subject to the exceptions discussed in Chapter 7.2, B's equitable interests only bind successors in title (C), but do not enable

[11] i.e., leases not subject to registration, s. 4(c)(i) LRA 2002.
[12] See Chapter 7.
[13] See 7.3 on the possessory protection of German leases.
[14] See 3.3

B to sue trespassers (X).[15] By contrast, in Germany, where the doctrinal starting point of property rights is their absolute nature and successor liability is a logical consequence, rights that *only* have ABC effects cannot be easily accommodated in property law. Hence, such rights are normally accounted for as anomalous personal rights, with far reaching third-party effects.[16] This triggers an interesting question: what are the implications of conceptualizing interests with pure ABC effects as property rights with limited third-party effects (as in traditional English doctrine) or as personal rights with far reaching effects (as in German law) or as a third category (e.g., as 'persistent rights'[17])? This thesis does not need to answer this question. It suffices to be aware that successor liability is not only triggered by rights that have ABX effects, but also by a group of rights that only give rise to successor liability. For this thesis, what is central, is to assess the impact that the *numerus clausus* has on the contractual creation of such rights.

(b) Functional structure

The doctrinal elements that allow the holder of a property right to assert such right against a subsequent holder of another right in the same thing correspond to what in Germany has been called 'protection against successors' *(Sukzessionsschutz*)[18] and in England, 'successor liability'.[19] For Eichler, in German law this protection is apparent in the persistence and enforceability of the right itself. The acquirer of a thing burdened with a real right must accept that such a right impacts her: property rights are enforceable against successors in title, despite the fact that they are not bound through a personal dealing with the new proprietor.[20] In the Anglo-American context, Penner highlights that successor liability is not characterized by all others presently owing a duty to B, but by the fact that all *may* become successors in title of A at some point.[21]

[15] Swadling (n 7) 180, 212.
[16] See n 25.
[17] See Ben McFarlane, *The Structure of Property Law* (Hart 2008) 23–25.
[18] Hermann Eichler, *Institutionen Des Sachenrechts*, vol 1 (Duncker & Humblot 1954) 7.
[19] James Penner, 'Duty and Liability in Respect of Funds' in John Lowry and Mistelis Loukas (eds), *Commercial Law: Perspectives and Practice* (Lexis Nexis Butterworths 2006) 215.
[20] Eichler (n 18) 6–7.
[21] Penner (n 19) 215.

Once successor liability is stripped of doctrinal elements, the following (preliminary) functional structure emerges: when A grants or transfers B a property right in a thing, anyone else that later acquires a right in the same thing from A (or a successor in title to A) will (or may) become subject to B's rights. Thus, if C acquires A's title, the former *may* come under the same duty to B, despite being a third party to the AB dealing (hereinafter, 'ABC cases'). Whether C is *actually* bound by B's right will depend on doctrinal aspects that are unique to each legal system but normally include the content of the rights (i.e., whether it is on the list of property rights), formalities (including registration), occupation, knowledge or notice of C.

(c) The *numerus clausus* and successor liability

The role of the *numerus clausus* in regulating successor liability is not as clear as in ABX cases. In England and Germany, rights that give rise to trespassory liability always have ABC effects. This outcome seems fairly intuitive: if B's right bind strangers, why would it not (*prima facie* at least) bind successors? Finally, before becoming a successor, C was also a stranger and, thus, already under the duty to respect B's rights. Why should C be freed from that duty towards B by acquiring A's right? However, in both jurisdictions there are some rights that produce ABC effects, but do not trigger trespassory liability ('pure ABC case'). In England, because these rights tend to be framed in the language of property law and, in particular, because rights held in trust are not subject to standardization, equity seems to present a massive challenge for the *numerus clausus*. However, an overlooked feature is that most equitable property rights have a standardized content. Rights arising under the 'doctrine of anticipation'[22] essentially mirror legal property rights and, thus, are also defined by the content of those legal property rights, while 'other equitable rights', as the restrictive covenant, must meet specific requirements as to their content.[23] This restricts the core of the challenge that equity poses to the *numerus clausus* to a well-defined type of equitable property right: beneficial rights under a trust.

[22] See *Walsh v Lonsdale* (1882) LR 21 Ch D 9 (CA).
[23] See 4.3.

In Germany, the absence of an equitable system makes this problem seem alien. However, German law also knows of cases with the same structure, but simply labels them differently. In this context,[24] the most salient examples are the protection afforded to the lessee of immoveable property against successors in title of the landlord and to the debtor who transfers moveable property for security purposes against the creditor's successors and own creditors. Nonetheless, because German law tends to describe such rights, not as a property right, but as personal rights with far reaching effects against successors,[25] the problem they create for the principle of *numerus clausus* seems less obvious,[26] even thought, at least for security ownership, they are not ignored.[27]

To a large extent, the puzzle that pure ABC rights pose for the *numerus clausus* arises from the circumstance that such rights cannot be fully explained by the canonical division between property rights and obligations. For example, German doctrine is fully aware that the ABC effect of the lease and security ownership is incompatible with the strict separation between property law and the law of obligations.[28] Similarly, English doctrine describes the trust as a legal institution on the border of the law of property law and the law of obligations.[29] Contemporary Anglo-American property theory has made relevant efforts to develop models that account for the conceptual structure of these borderline cases. Merrill and Smith place many of these institutions along a continuum they name the 'property/contract interface'. In their view, one pole of this continuum is made of pure *in rem* rights, meaning rights that impose duties on

[24] There are other specific cases where obligations can become binding upon successors, as with the *actio pauliana*, see § 129 InsO.
[25] For the lease, see Volker Emmerich, 'Miete' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 982; Sjef van Erp, 'Comparative Property Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1041. For the *Treuhand*, see Stefan Grundmann, *Der Treuhandvertrag: Insbesondere Die Werbende Treuhand* (Beck 1997), Chapter 7; Stefan Grundmann, 'Trust and Treuhand at the End of the 20th Century - Key Problems and Shift of Interests' (1999) 47 Am J Comp L 401, 411; Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia 2008) 184.
[26] See 3.2 and 4.2.
[27] See Wolfgang Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht' (1990) 1/2 AcP 112, 131–135. Discussed in 4.2.
[28] See 3.2.
[29] E.g., Swadling (n 7) 210.

numerous and indefinite third parties. The other pole is composed by pure *in personam* rights, this is, rights that give rise to few and specific duty holders. Because numerosity and definiteness are contingent variables, the interface is made of two intermediate cases Merrill and Smith explain using a Hohfeldian terminology: indefinite and singular ('quasi-multital') and definite and numerous ('compound-paucital') rights.[30]

A problem of this account is that it inadvertently collapses two continuums into one. By definition, a continuum is based on one variable that can be arranged linearly: in Hart's famous example, being bald or not is in a continuum depending on one variable: how many hairs a person has on her head.[31] However, Merrill and Smith's 'property/contract interface' is made of two variables: definiteness and numerosity. Moreover, because this approach defines rights by their effects, it assumes too readily that the difference between pure *in rem* and pure *in personam* rights is a matter of degree. Thus, Merrill and Smith's interface is better explained as a double entry table (Figure 1), not a continuum.

Figure 1: property/contract double entry table

	Many people	**Few people**
Indefinite	*In rem* (ABX/ABC)	Quasi-multital (pure ABC, not ABX)
Definite	Compound-paucital (?)	*In personam* (AB)

In their model, Merrill and Smith do not explicitly distinguish between successor and trespassory liability. However, once the property/contract interface is transformed into a double entry table, it becomes clear that quasi-multital rights correspond to pure ABC rights: successor liability involves a duty for a specific holder that remains indefinite at the moment of its creation. For Merrill and Smith, the essential problem of quasi-multital rights is one of information: short of standardization, the law opts for

[30] Thomas W Merrill and Henry E Smith, 'The Property/Contract Interface' (2001) 101 Colum L Rev 773, 774, 777, 785.
[31] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 4.

strategies based on notice or on the protection of uninformed parties.[32] Advancing the thesis put forward in Chapter 6.4, this chapter will depart from Merrill and Smith's argument, showing that the information problem is only a part of a wider network of problems that is ultimately explained by the need of protecting the freedom of successors in title.

The property/contract interface has two important merits. It provides a clear account of the effects that make pure ABC rights appear as borderline cases and delineates some of the strategies the law uses to deal with the information problems they create. However, due to its exclusive focus on the *effects* rights have on people, it fails to provide a conceptual account of their (internal) structure. Such approach suggests that the difference between the rights Merrill and Smith place in a continuum is not really a matter of degree. As mentioned before,[33] in recent years authors such as Ben McFarlane and Robert Stevens have advanced a new understanding of equitable property rights that might help to fill this gap. They argue that these rights are fundamentally different from both legal property rights and personal rights, and therefore transcend the property-obligations divide. The core of their view is that equitable rights are neither rights against things nor rights against persons, but *rights against rights*. In this, they see the key to understanding why equitable rights can be enforced against successors, but not strangers. For example, when A holds a property right on trust for a beneficiary (B), B does not hold a right in the thing, but a right against A's right in the thing. Because B has no rights in the thing, she cannot exclude strangers (X) from it, needing to rely on A for this purpose. However, B's right against the trustee (A) does, *prima facie*, bind a party who later acquires the right from A (C). Thus, B has a right against C's right in the thing, and they label the ability of B's right to have such an effect on C as 'persistence'.[34] For Douglas and McFarlane this has relevant implications, including that it explains why there is no *numerus clausus* of rights held in trust. First, when A sets up a trust in favour of B, the duties X owes to A are not affected. Second, even if C acquires the trust property, and is not a bona fide

[32] Merrill and Smith (n 30) 805–808.
[33] See 3.3, 4.4 and 7.2
[34] Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1.

purchaser without notice of B's right, if C remains ignorant of any breach of trust until after the point when C disposes of the trust property and any traceable proceeds, B has no claim against C.[35] In their view, this is consistent with Smith's modular strategy, although the organizing module in these cases is not the thing, but the right held by the trustee.[36]

Due to the existence of a category of rights that only have ABC effect, the relevance of the *numerus clausus* in controlling the free creation of successor liability is only relative. In principle, the right that B acquires from A can only bind C if its content matches the description of one of the rights contained in a closed list of rights which is the same of that of ABX rights. However, in both Germany and England there is a group of cases in which C can become liable to B, despite B not holding a right in such list. In the former these are seen as personal rights with anomalous third-party effects, while in the latter, as (equitable) property rights.

The erosion of the *numerus clausus* by these cases should not be overstated. As discussed below, the enforceability of these rights against successors might not be strictly policed by a content-test, but is still subject to other doctrines that aim to protect the position of C, typically involving formalities or some sort of knowledge. In this sense, even if the *numerus clausus* does not impose a full restriction on the creation of successor liability, the creation of rights with ABC effects outside the *numerus clausus* is not free. The resulting functional structure is the following: in both English and German law, in principle, A can only grant B a right binding upon A's successor in title (C) if such right is contained in the list of ABX rights. Exceptionally, in both systems, A can grant B a right binding upon C that is not contained in such 'menu'. The enforceability of such rights upon C is not controlled by a stringent content test, but by other doctrines, typically based on notice, actual occupation, formalities or a weak content test.

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[35] Discussed in *Independent Trustee Services Ltd v GP Noble Trustees Ltd and others* [2012] EWCA Civ 195 and *Re Montagu's Settlement Trusts* [1987] Ch 264.

[36] Simon Douglas and Ben McFarlane, 'Defining Property Rights' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 241.

As discussed in Chapter 6.2, the role of the *numerus clausus* in this context has been disputed. On the one hand, the circumstance that successor liability can be controlled by knowledge or registration has led some, especially Richard Epstein,[37] to argue that the *numerus clausus* is an obsolete doctrine that undermines freedom of contract without justification and that its purpose would be better served by purely relying on a strong registration system made possible by contemporary technology. A similar although more nuanced argument has recently been put forward by Hanoch Dagan and Irit Samet, although based on a liberal conception of property law.[38] On the other hand, authors such as Bram Akkermans[39] or Susan Pascoe[40] have argued that freedom of contract and the protection of successors would be better balanced by stronger reliance on a judicial *ex-post* control based on open ended terms such as 'reasonableness'. However, as discussed in Chapter 6.2, registration and notice cannot fulfil all the functions of the *numerus clausus* in controlling the impact of successor liability on third parties, because its impact goes beyond information problems, while *ex-post* controls of open-ended terms are subject to high administrative costs and create great uncertainty.

As argued in Chapter 6.4, the *numerus clausus* fulfils a broader function related to the preservation of property rights as essentially unburdened spaces of personal freedom. In cases of trespassory liability, the relevance for property law is contingent on X exercising her liberty on her property. However, in cases of successor liability, this effect is inherent to property law, as it preserves the modular structure of the property right owned by C. Building on this view, the rest of this chapter will test the relevance of this conclusion by discussing how in England and Germany the *numerus clausus* ensures that private law retains a doctrinal structure that allows a list of, apparently, old and rigid property forms to satisfy new real-life problems.

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[37] Richard A Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' (1981) 55 S Cal L Rev 1353; Richard A Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 WashU LQ 667.
[38] Hanoch Dagan and Irit Samet, 'Express Trust: The Dark Horse of the Liberal Property Regime', *Philosophical Foundations of the Law of Trusts (Simone Degeling et al eds., Forthcoming 2022)* 18, 28 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3753282> accessed 28 January 2022.
[39] Akkermans (n 25).
[40] Susan Pascoe, 'Re-Evaluating Recreational Easements- New Norms for the Twenty-First Century?' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law*, vol 10 (Hart 2019).

8.2. England: covenants, easements and trusts

(a) The dynamic protection of freedom

As mentioned in Chapter 7.2, this thesis can only suggest how the *numerus clausus* might shape the intertemporal operation of private law by discussing some examples and developing arguments based on them. As with trespassory liability, in English law, this is facilitated by the ease with which doctrine can be related to well-studied historical and social processes.

(i) From horses to steam engines

As mentioned in Chapter 4.3, the leading case discussing the impact of the *numerus clausus* principle on successor liability is *Keppell v Bailey.*[41] The case concerned an agreement entered into in 1795 by the owners of three ironworks located in South Wales, who formed a stock company to build a railroad (the Trevil Railroad) under the Monmouthshire Canal Act. The purpose of the railroad was to link their facilities to a close limestone quarry. As part of a four-party agreement with the corporation, the owners of the ironworks agreed to satisfy all the requirements of their works through such railroad under a certain price scheme, binding themselves and their successors in title as covenantors. In 1833 the heir of one of the original owners (A) sold the Beaufort Ironworks to Mr. Bailey (C), who then started to build a tramway to link it to his mill in Nantyglo. Relying on the covenant contained in the 1795 agreement, the owners of the other iron works and shareholders of the Trevil Railroad (B), tried to obtain an injunction to prevent Mr. Bailey from building the tramway.[42] As explained in Chapter 4.3, the injunction was rejected by Lord Brougham holding that such an agreement did not create a recognized type of proprietary right and, therefore, was not enforceable against a subsequent purchaser of the ironworks.

[41] (1834) 2 My & K 517.
[42] Ben McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law' in Nigel Gravells (ed), *Landmark Cases in Land Law* (Hart 2013) 3–5.

When this outcome is assessed in its wider context, it becomes apparent that preserving Mr. Bailey's right to supply his ironworks or remove goods from it as he saw fit (this is, a Hohfeldian 'liberty') had a decisive impact in allowing the property system to accommodate a massive economic transformation without altering its basic structure. Before the Industrial Revolution, Britain's iron production was fairly modest, but during the second half of the 18th century, war and the rise of a fuel economy gave the British iron industry a market strong enough to incentivize constant technical improvements.[43] By the late 18th century, the juxtaposition of superficial coal, ironstone and limestone had given South Wales a unique position to take advantage of these new technologies.[44] As with most economic activities predating the First Industrial Revolution,[45] the main challenge of the South Welsh iron industry seems to have been the high costs of transport.[46] Thus, the industrial revolution only really kicked-off in this area with the opening of the Monmouthshire Canal in 1796.[47]

Benefiting from the canal required entrepreneurs to build additional infrastructure to access the waterways,[48] at that time, normally horse-drawn tramways.[49] Due to the economic structure of investments in transport infrastructure (large initial capital outlays, long time to see returns and dispersed social benefits), financing these works historically required collective capital that normally could only be raised by governments. However, in a phenomenon characteristic of the First Industrial Revolution in Britain, this capital was primarily raised by private entrepreneurs who expected to benefit from the new infrastructure.[50] The financing of the early industrial railroad followed the same structure.[51] Against this background, it is not hard to see

[43] Eric Hobsbawm, *Industry and Empire* (3rd rev edn, Penguin 1999) 48.
[44] Michael Atkinson and Colin Baber, *The Growth and Decline of the South Wales Iron Industry 1760-1880* (University of Wales Press 1987) 4–5, 36–38.
[45] See Phyllis Deane, *The First Industrial Revolution* (2nd edn, CUP 1980) 76, 77.
[46] See Atkinson and Baber (n 44) 74–75.
[47] McFarlane (n 42) 3; see also Atkinson and Baber (n 44) 75.
[48] Atkinson and Baber (n 44) 75.
[49] Mark Casson, *The World's First Railway System: Enterprise, Competition, and Regulation on the Railway Network in Victorian Britain* (OUP 2009) 51–52.
[50] Deane (n 45) 72, 73, 80.
[51] Casson (n 49) 49, 50.

that the covenant agreed in the 1795 agreement was aimed to secure the financing of the Trevil Railroad.[52]

By the late 1820s smelting with coke and the invention of 'hot blast' smelting and 'puddling and rolling' had raised the overall capacity of the British iron industry,[53] taking away the comparative advantages of the Welsh ironstone.[54] Furthermore, the construction of lines for the new steam railway gave the iron industry a constantly growing demand,[55] while the new railways also affected the supply side. Before 1825 the typical railway involved a short line of wooden rails from a mine or quarry to a neighbouring waterway, but by 1830 local citizens all over Britain were anxious to connect their towns, ports and industries to a new integrated national rail network.[56]

By the time of *Keppell*, the horse-drawn wagons of the South Welsh ironworks must have been becoming relatively slow and expensive. Indeed, in 1829 locomotives were tried in different lines adjoining the Monmouthshire Canal.[57] When Mr. Bailey decided to acquire the Beaufort Ironworks in 1833, he must have been aware of the new demand for iron and the growing competition faced by the Welsh ironworks. Thus, one can assume that he planned to take advantage of scale and network economies of using such ironworks together with his neighbouring mill at Nantyglo to reach new markets and access them through a better transport route.[58] Thus, by relying on the *numerus clausus* principle to reject the injunction against Mr. Bailey, Lord Brougham allowed the new owner of an industry from an era of waterways, horse-drawn wagons and wood rails, to adapt his business to a new age of iron railways and steam engines by 'resetting' his property rights or, to use Honoré's terminology,[59] by recognizing that the rights of Keppell and the other shareholders of the Trevil Railroad had been 'divested by alienation'.

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[52] See McFarlane (n 42) 26.
[53] Hobsbawm (n 43) 48.
[54] See Atkinson and Baber (n 44) 32–33, 38–45.
[55] Hobsbawm (n 43) 48–49.
[56] Casson (n 49) 53–54.
[57] See John Hodge, *Railways and Industry in the Western Valley* (Pen & Sword 2016) Chapter 1.
[58] See ibid.
[59] See AM Honoré, 'Rights of Exclusion and Immunities Against Divesting' (1959) 34 Tul L Rev 453.

Keppell also exemplifies the tension between contractual freedom and the protection of successors in title that triggered the economic approaches to the *numerus clausus* discussed in Chapter 6.2: at the beginning, the covenant may have been the most efficient solution to secure capital for the tramway, but in the long run, this deal prevented the parties from taking advantage of new (more efficient) opportunities. Thus, the *numerus clausus* seems to sacrifice present and certain efficiency for future and eventual gains, which is hard to justify. However, this is not an accurate description of the tension. As frequently argued in the Law & Economics debate,[60] by making a more careful use of the modules of private law, the initial partners could have structured their business in a manner that allowed them to secure the revenue to refund the capital costs, without indefinitely restricting the use of the ironworks, for example, by binding themselves to repay the investment in 30 years, securing the debt with a collateral over the ironworks and making the debt assignable to its future owners.

(ii) Changing social value of sport and recreations

In *Keppell*, the *numerus clausus* allowed the functional transformation of the Beaufort Ironworks by liberating C's land from an AB dealing. However, the *numerus clausus* does not always work by excluding successor liability. With the exception of rights under a trust,[61] this principle operates by limiting this liability to a well-established list of property rights defined by their content. Chapter 6.4 proposed that the aim of this doctrine is not only to standardize property rights but to create a *type of standardization* that ensures that, even if C will remain liable to B, she will retain enough freedom to decide how to use 'the thing' and that any limitations on such freedom will be justified by sound policy considerations. This subsection will discuss the doctrinal elements that make this substantive control possible by analysing some elements of the English law of servitudes.

[60] E.g., Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale LJ 1, 35.
[61] See n 34 and accompanying text.

According to English doctrine, the law of servitudes, which encompasses easements and restrictive covenants, is one of the few areas of English property law that allows the creation of duties binding successive owners of land.[62] F.H. Lawson and Bernard Rudden define easements and restrictive covenants as real (i.e., property) rights that bind one piece of land and benefit another, regardless of who owns them. The rights that both entitlements grant the dominant owner are strictly controlled by the law, ensuring that the correlative duty of the servient owner is always negative.[63] The paradigm of the grant excluded from being an easement under this rule are duties that imply spending money.[64] Thus, private parties are not free to create servitudes as they wish: they have to use the types established by the law.

Along with a 'certainty' requirement,[65] the negative nature of the duties that servitudes impose on servient owners plays an obvious role in ensuring that successors in title will not be subject to burdens that will substantively jeopardize their liberty to use or transfer the land. However, from a doctrinal perspective, the constraints that the law imposes on the free delineation of servitudes are far more complex and sophisticated. Their doctrinal operation is central to the functional transformation of property law, as they allow that both the servient and the dominant land remain capable of accommodating new social and economic needs. To a certain extent, this seems grounded in a paradox. For example, discussing easements, Swadling explains that the list is not closed, but also states that this must be read in the context of the *numerus clausus*: new types of easements can be brought into being, but they must conform to a standard model.[66] To see how this operates, it is necessary to approach the doctrinal elements of servitudes more closely. Considering that English easements and German land servitudes share a common Roman influence that facilitates a comparative analysis, this subsection will mainly focus on easements.

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[62] FH Lawson and Bernard Rudden, *The Law of Property* (3rd edn, OUP 2002) 152–158; Elizabeth Cooke, *Land Law* (2nd edn, OUP 2012) 211–235.
[63] Save for the obligation to maintain a fence. Lawson and Rudden (n 62) 153–156.
[64] See ibid 153; Cooke (n 62) 215.
[65] See *Burrows v Lang* [1901] 2 Ch 502.
[66] Swadling (n 7) 195.

According to *Re Ellenborough Park,*[67] the leading case in the modern English law of easements, to qualify as such, an easement must, among other things, 'accommodate' the dominant tenement and be 'capable of forming the subject matter of a grant'. The content control that the *numerus clausus* imposes on the creation of easements arises mainly from these two requirements, but both serve different functions. As argued below, the former requirement ensures that that the burden is justified from a policy perspective and the latter ensures that successors in title of the servient land will retain sufficient freedom to use and deal with the land.

Subject matter of grant

The requirement that the right must be 'capable of being the subject matter of a grant' has been said to only mean that the right must be '*the sort of thing that can be an easement*'[68] and has been described as an '*inept shorthand*'[69] for number of criteria that is '*both obscure and unhelpful*'[70] and '*not entirely logical*'.[71] Contrary to this view, this subsection argues that the criteria required by the law for a right to qualify as an easement do have a clear rationality: safeguarding the freedom of the successor in title of the servient owner.

The first criterion is that the grant cannot impose a positive duty on the servient owner.[72] Its relevance has already been discussed. Here it is only needed to highlight that the prohibition of imposing a duty of spending money on servient owners resembles the goal of the civilian codification to avoid feudal duties[73] and that English doctrine sees in this a precondition of modern property rights oriented to protect personal liberty from interference.[74] Indeed, discussing a case in which the House of Lords refused to enforce a positive freehold covenant on a successor in title,[75] J.W.

[67] [1956] Ch 131, 163.
[68] Cooke (n 62) 215.
[69] Simon Gardner and Emily MacKenzie, *An Introduction to Land Law* (4th edn, Hart 2015) 309.
[70] Albert McClean, 'The Nature of an Easement' (1966) 5 W L Rev 32, 61.
[71] Cooke (n 62) 215.
[72] *Schwann v Cotton* [1916] 2 CH 459; *William Old International Ltd v Arya* [2009] EW HC 599.
[73] See 4.2, 6.3 and 8.3.
[74] Swadling (n 7) 199.
[75] *Rhone v Stephens* [1994] 2 AC 310.

Harris argued that such refusal may be explained by the feudal-like domination-potential inherent to positive duties.[76]

The second criterion, the limitation on the creation of new negative easements (i.e. those that do not allow B to do something on A's land, but simply prevent A doing something with A's own land),[77] follows the same logic. Negative easements seem to be strictly numbered[78] and, even if the list is not closed, courts are cautious to recognize new forms. As held by Lord Denning MR in a case in which he rejected a new form of easement imposing a duty not to demolish a house that was protecting a neighbouring dwelling from the weather, '*the reason (…) is that if such an easement were to be permitted, it would unduly restrict your neighbour in his enjoyment of his own land. It would hamper legitimate development*'.[79]

The same idea seems to underpin the so called 'ouster' principle. According to it, a right to exclusive or joint possession or occupation over the servient land cannot qualify as an easement.[80] From a doctrinal perspective, the most common explanation for this is that, otherwise, the right in question would be an estate, as having access to an open-ended list of privileges is the divide between estates and interests in land.[81] The precise content, rationale and utility of this requirement is highly contested,[82] and the Law Commission has recently even recommended its derogation.[83] Discussing its content is beyond the scope of this thesis, but if we focus on the duty bearer instead of the right holder, [84] it is apparent that the different formulations of the principle ensure that servient owners retain a well-defined space of freedom, that is broad enough to provide them with agency in the management of the land, or the part of the land not subject to exclusive occupation. For example, in a recent opinion delivered in a Scots

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[76] JW Harris, *Property and Justice* (OUP 1996) 328.
[77] See *Phipps v Pears* [1965] 1 QB 76, CA4.
[78] Lawson and Rudden (n 62) 154.
[79] *Phipps*, 82
[80] See *Copeland v Greenhalf* [1952] 1 Ch 488.
[81] Susan Bright, 'Of Estates and Interest: A Tale of Ownership and Property Rights' in Susan Bright and John Dewar (eds), *Land Law. Themes and Perspectives* (OUP 1998) 534–536.
[82] E.g., see Peter Luther, 'Easements and Exclusive Possession' (1996) 16 LS 51.
[83] See Law Commission, 'Law Com No 327. Making Land Work: Easements, Covenants and Profits à Prendre' (2011) 65.
[84] On this, see Luther (n 82) 62.

law case, the House of Lords explicitly approached the ouster principle focusing on whether the '*servient owner is left with any reasonable use of his land*'. [85]

The criteria clustered under the requirement that the right must be 'capable of being the subject matter of a grant' might be obscure and lack systematicity, but they are far from unhelpful or irrational. When the focus is put on their effect on the ownership of duty-bearers, it becomes apparent that they establish a substantive control on the creation of successor liability that ensures that subsequent owners will retain a significant degree of discretion regarding their land. Thus, contrary to intuition, these restrictions on the creation of new property types do not make property law more rigid, but ensure that the flexible modular structure of ownership is preserved over time. Like *Keppell*, by curtailing freedom in the creation of easements, the *numerus clausus* protects the flexibility associated with the basic exclusionary structure of property law.

This requirement does not completely freeze the available types of easements. Because its criteria are not strictly defined by the content of the liberty of the dominant owner over the servient land, but by their impact on the duty bearer, novel types of easements that only impose negative duties on the servient owner and are not incompatible with her meaningful possession, might qualify as easements. This is not a new realization. In the 19th century there was a wide acceptance that old types of easement could and should accommodate new examples within the existing types, allowing them to '*alter and expand with the changes that take place in the circumstance of mankind*'.[86] However, this idea lost visibility during the 20th century, as a result of changes in the way the law of easements is presented in the leading English textbook on this matter, 'Gale on Easements'.[87] This subsection will conclude that making this older view visible again is a better way to bring flexibility to property law than getting rid of the *numerus clausus* or making it an *ex-post* test.

Accommodation

[85] *Moncrieff v Jamieson* [2007] 1 WLR 2620, HL [59].
[86] As per Lord St. Leonards in *Dyce v. Hay* (1852), 1 Macq. 305, 312.
[87] McClean (n 68) 33–34; cf Graham Glover, *Gale on Easements* (12th edn, Sweet & Maxwell 1932) 21–22.

What remains unanswered is towards which direction the law of easements should develop. The answer for this is in the requirement that the right must 'accommodate land'. According to this test, to qualify as an easement, a grant must serve whoever is the owner of the land *as owner*, as opposed to providing a personal advantage to a particular owner.[88] As shown below, this substantive requirement works as an interface between the internal (doctrinal) structure of easements and their external (policy) effects, thereby serving as a safety valve that releases the pressure social change imposes on the doctrinal structure of easements. In this view, at the risk of oversimplification, the elements of easements can be visualised as 'buckets'.[89] On the one hand, the 'subject-matter of a grant' requirement provides the bucket with a rigid, stable but also opened-ended structure aimed to protect the freedom of whoever will have to carry the bucket. On the other, since the bucket is still a burden on whom has to carry it, 'the accommodation test' provides a flexible criterion to ensure that the bucket will only be filled with elements that, according to a long-term utility test, are worth being carried for a, potentially, indefinite time.

In English law, the basic elements that define the structure and use of these 'buckets' were borrowed from the Roman law of servitudes,[90] and experienced a significant development during the 19th century.[91] As the enclosure movement was coming to an end,[92] landowners realized that land could be exploited in an even more efficient manner by a collaborative use of plots owned by different owners. In the urban context, intensive building of mills and factories also called for similar solutions,[93] this is, for 'governance strategies'.[94] However, cross-exploitation of land comes at a cost and, therefore, must be restricted to cases where it does more good than harm: the broader the scope of the duty imposed on the servient land, the more the servient land ceases to be 'owned' in a meaningful way by the servient owner, diminishing her chances to

88 See *Moody v Steggles* (1879) 12 Ch D 261.
89 This analogy was suggested to me by Prof. Kenneth Reid in the 2019 Edinburgh-UCL PhD Workshop.
90 Lawson and Rudden (n 62) 153.
91 Gardner and MacKenzie (n 69) 315.
92 See Mark Overton, *Agricultural Revolution in England: The Transformation of the Agrarian Economy* (CUP 1996) 147–192; Karl Polanyi, *The Great Transformation* (2nd edn, Beacon 2001) 36–42.
93 Gardner and MacKenzie (n 69) 315.
94 See Henry E Smith, 'Property as the Law of Things' (2012) 125 Harv L Rev 1691, 1693, 1694, 1709.

make an efficient use of the land as a separate entity.[95] Thus, easements undermine the basic modular structure of property law in the simple sense that they allow one module to permanently interfere with another.

From a static perspective, when easements originate in an agreement, the effect on the servient land is not problematic, as the bargain guarantees that the servient owner will be compensated for the impact on her land. However, from a dynamic perspective, ensuring that the gain for the dominant owner will continue to outweigh the alternative use of the servient land is not that easy.[96] This is of paramount practical importance because easements are not restricted in time and explains why legal systems have developed doctrines to police the creation of easements, either *ex ante*, as in England,[97] or *ex post*, as in the US.[98]

For example, in *Ellenborough Park*, the easement subject to litigation was granted more than 90 years before the case was tried. In the world of zero transaction costs this would not be a problem, as parties could always contract around it.[99] However, as argued in Chapter 6.2, in the real world, this might not happen because property rights are subject to a 'law of entropy' that makes the reunion of all the fragments in one bundle hard to achieve.[100] Hence, even if an AB dealing for cross-exploitation of land can be efficient at the time of the agreement, it locks the servient land into a situation that undermines its functional transformability (as in *Keppell*). Faced with this dynamic balancing problem, the accommodation test aims to ensure that the policy reasons that justify the imposition of a duty on C will subsist over time, especially if B1 wishes to change the use of the land or transfers it to a third party (B2). As a result, the

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[95] Gardner and MacKenzie (n 69) 315, 316.
[96] In similar terms, James Gordley, *Foundations of Private Law* (OUP 2006) 81–82; Ben Depoorter and Francesco Parisi, 'Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes' (2003) 3 Global Jurist i, 1–2.
[97] Pascoe (n 40) 184–186. English law has methods to extinguish restrictive covenants that have become obsolete (s. 84(1)(a) LPA 1925), but despite the proposal of the Law Commission, there is no mechanism for a court or another body to put an end to an easement, no matter how useless or troublesome it may be, Cooke (n 62) 224.
[98] Susan French, 'Highlights of the New Restatement (Third) of Property: Servitudes' (2000) 35 Real Prop Prob & Tr J 225, 226, 228, 214–242.
[99] See Ronald Coase, 'The Problem of Social Cost' (1960) 3 JLE 1.
[100] See Francesco Parisi, 'Entropy in Property' (2002) 50 Am J Comp L 595; Michael Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 Harv L Rev 621.

accommodation test operates as a utility control on the free creation of easements that imposes a significant restriction of the content of ABC rights. The function of this requirement is to ensure that the AB dealing will remain justified over time, when the dominant land is in new ownership. However, due to its open-ended nature, the accommodation test also provides the law of easements with a principle of growth: what rights accommodate the dominant land can change over time. This is apparent in some recent developments triggered by changes in the social significance of sports and outdoors activities.

Re Ellenborough Park involved some houses that had been sold in the 1860s together with a right to fully enjoy a surrounding park. During the Second World War, the park was requisitioned and, to decide whether the owners of the houses were entitled to compensation, it became necessary to establish whether the rights to enjoy the park qualified as easements. According to what were held to be the relevant authorities,[101] to accommodate land, the right had to be '*of utility and benefit and not of mere recreation and amusement*'.[102] In *Ellenborough Park*, in a reasoning that already implied a relaxation of previous criteria, the court held that, in a residential context, the right to use a garden fulfilled this test, but excluded '*rights to indulge in such recreations as (…) horse racing or (…) playing games*'.[103]

Since *Ellenborough Park*, the social value of sports and outdoor activities has changed dramatically.[104] At least since the 1960s, physical activities have come to be seen as instrumental for health and social wellbeing. In 1966 the Council of Europe implemented the 'Sport for All' policy to achieve physical and mental health and social benefits, later consolidated in 1975 by the European Sport for All Charter, and the 1991 and 2001 European Sports Charter. This development has been reflected in policy initiatives in the UK,[105] revealing the growing value that people attribute to

[101] *Mounsey v Ismay* (1865) 3 H& C 486, *Lady James Hay* (1852) 1 Macq 305, *Dempster v Cleghorn* (1813) 2 Dow 40.
[102] At 177, citing Theobald's The Law of Land, 2nd ed (1929) at p. 263.
[103] At 178.
[104] See Pascoe (n 40).
[105] See Paul Downward, Kirstin Hallmann and Simona Rasciute, 'Exploring the Interrelationship between Sport, Health and Social Outcomes in the UK: Implications for Health Policy' (2017) 28 Eur J Public Health 99, 99.

having access to sporting facilities. However, the valuation of sports as a 'mere recreation' under *Ellenborough Park* seems to make it impossible for a right to use such facilities to qualify as an easement, making the *numerus clausus* a hurdle for adjusting property law to social change.

Nonetheless, recent English case law shows how the open-ended structure of the 'accommodation test' allows property law to account for social changes,[106] without altering its basic structure. In *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd.*,[107] a time share development granted the owners of some villas a right to use different sporting facilities, triggering the question as to whether these rights were granted as personal rights against the developer or as easements over the land. Faced with *Ellenborough Park,* the Court of Appeal held that the right to use outdoor facilities qualified as property rights, arguing that '*[e]asements in the modern world must (…) retain their essential legal qualities. But the views of society as to what is mere recreation or amusement may change (…). Physical exercise is now regarded by most people in the United Kingdom as either essential or at least desirable part of their daily routines. It is not mere recreation or amusement*'.[108] The Supreme Court upheld the decision (although it departed from the distinction between indoor and outdoor activities), adding that time shares are a recent concept -another acknowledgment to social change- and that even if sporting facilities were primarily recreational, the fact that timeshares are typically occupied for holidays, shows that they provided utility and service to the apartments.[109]

Regency Villas has been celebrated for introducing flexibility into the law of easements, inspiring scholars to propose new frameworks that depart from the anti-feudal and anti-fragmentation rationality that has traditionally been used to explain the law of easements in England.[110] However, the open-ended texture of the accommodation test does not imply that the doctrinal structure of easements needed

[106] See Pascoe (n 40).
[107] [2018] UKSC 57; [2017] EWCA Civ 238.
[108] [2017] EWCA Civ 238 [54].
[109] [2018] UKSC 57 [53].
[110] See Pascoe (n 40).

to be altered to keep the law in step with society. Following Lord Carnwath's dissent, *Regency Villas* would have been better decided if the court had distinguished between the use of facilities that required positive actions by the servient owner and those that only required her tolerance.[111] This suggests that a robust 'capable of a grant' test should provide judges with more leeway when assessing the 'accommodation test', and *vice versa*. In this line, the analysis put forward in this subsection suggests that new theories are not needed to account for the ability of the law of easements to accommodate new social realities. To start, it is not obvious that the law of easements required any change to accommodate the new social perception of sporting activities. As suggested by the Supreme Court, [112] probably the same practical effect could have been reached by using traditional leasehold covenants to structure the time-share development. However, even if this was not true, the old 'bucket' structure of easements could accommodate the change. On the one hand, by denying admission into the list to rights that impose positive duties on C, the *numerus clausus* safeguards the ability of successors to functionally transform land, as in *Keppell*. On the other hand, by having an open-ended accommodation test, the *numerus clausus* also provides judges with some discretion to assess policy arguments that justify the imposition of new proprietary duties on third parties in light of the changing values of society, like in *Regency Villas*.

(b) Successor liability outside the *numerus clausus*

The scheme presented above is challenged by, at least, two elements of English property law that allow creating non standardized rights with ABC effects: first, leases admit the almost free creation of positive covenants running with the land and, second, trusts allow the almost unlimited creation of property rights behind the trust curtain. This subsection accounts for both cases. In the case of leases, it argues that the substantive control operates at a different level due to the different economic function served by this relationship. In the case of the trust, it argues that successor liability is

[111] [94]-[115].
[112] See [2018] UKSC 57 [9] [23] [80].

controlled by functionally equivalent doctrines that are better tailored to the need of wealth and resource management.

(i) The ABC effects of leases

Leases almost always begin in contract by an agreement between two parties. However, leases also confer on lessees an alienable property interest (a leasehold), which is valid against the successor in title of the freeholder. To qualify as a leasehold, the grant must comply with some stringent requirements of content and form.[113] As to the content, only agreements that confer a right to exclusive possession ('exclusive possession rule') subject to a term certain from the onset ('term of years rule') qualify as leases.[114] Whenever these two elements are found, they give rise to a lease, irrespective of the intention of the parties or the name they give to their deal.[115] The latter has been recently criticised as an excessive commitment to a 'substance over form' rationality, arguing that there is no good reason to deny parties the liberty to grant a personal right to exclusive occupation.[116] This argument is not without merit, but is not relevant for this research, as it does not engage with the limitation on the creation of property rights, but with the unreasonable restriction on the creation of personal rights.

On the one hand, the 'exclusive possession' rule is aimed to provide 'ownership' to the tenant in the form of '*an indefinitely large set of use privileges and control-powers over the land*',[117] distinguishing it from other property interests in land[118] (like easements) and personal rights (like licenses).[119] However, doctrine has been more concerned with establishing what amounts to a right to exclusive possession in practice[120] than with its justification or function. On the other hand, the 'term of years' rule has been

[113] Lawson and Rudden (n 62) 117.
[114] *Street v Mountford* [1985] AC 809, HL.
[115] See *Street*.
[116] Häcker Birke, '"Substance Over Form": Has the Pendulum Swung Too Far?' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019) 38–45.
[117] Harris (n 76) 69.
[118] Bright, 'Of Estates and Interest: A Tale of Ownership and Property Rights' (n 81) 538.
[119] See *Westminster City Council v Clarke* [1992] UKHL11, [1992] 2 AC 288, HL.
[120] E.g., see Swadling (n 7) 186–189.

heavily criticised for having no rationale at all.[121] In *Prudential Assurance Ltd v London Residuary Board*[122] Lord Templeman described its effect as the '*bizarre outcome (…) from the application of an ancient and technical rule of law which requires the maximum duration of a term of years to be ascertainable from the outset. No one has produced any satisfactory rationale for the genesis of this rule. No one has been able to point to any useful purpose that it serves at the present day*'.[123] Contrary to this view, this subsection will show that the control-content that these two rules impose on leases are critical to keeping the modular structure of property law and enabling the functional transformation of property rights.

In England, leases are widely credited with providing property law with a flexible structure that allows the 'temporal slicing' of ownership, while subjecting such temporal segment to an extremely certain limit, thereby forcing anyone wanting to deal in other (complex) time slices to act '*behind the curtain of [the] trust*'.[124] By these means, leases allow the temporal deployment of the basic exclusionary module of ownership in an almost unlimited number of real-life contexts, including housing, commerce and agriculture. Depending on their practical purpose, the temporal extension of leases is subject to great variation. Shorter leases normally involve the payment of market rent by the leaseholder and leave all the capital value of the property with the freeholder. Longer leases normally involve the payment of a substantial initial premium and very low or nominal rents, thereby allocating the capital value of the property to the leaseholder.[125]

From a doctrinal perspective, leases are a collection of reciprocal contractual obligations between landlord and tenant known as 'covenants'.[126] Different to freehold covenants, leasehold covenants do not need to be negative to bind successors in

[121] Although efforts have been made to explain it based on the *nemo dat* principle. See Ian Williams, 'The Certainty of Term Requirement in Leases: Nothing Lasts Forever' (2015) 74 CLJ 592.
[122] [1991] UKHL 10, [1992] 2 AC 386, HL.
[123] [1992] 3 WLR 279, p. 287.
[124] See Peter Birks, 'Five Keys to Land Law' in Susan Bright and John Dewar (eds), *Land Law. Themes and Perspectives* (OUP 1998) 463.
[125] See Susan Bright, *Landlord and Tenant Law in Context* (Hart 2007) 5–6.
[126] See Cooke (n 62) 187–192.

estate, and after the passing of the Landlord and Tenant (Covenants) Act 1995,[127] parties can agree on almost any possible obligation. These covenants can be very complex, especially in shared buildings of flats. In some cases, especially in commercial contexts, they impose duties as to the use of land.[128] As long as they remain within 'privity of contract', leasehold covenants do not challenge the *numerus clausus*. However, once the original parties alienate their interest, their successors in estate will become automatically subject to such covenants as duties running with the estate, provided that the obligations relate to the property and not to the specific individuals.[129] By this means, leasehold covenants give rise to a type of successor liability that English law captures in the idea of 'privity of estate': successors to landlords and tenants remain bound by the covenants.[130] The broad liberty that private parties enjoy to create covenants in this context plays a central role in allowing ownership of flats and offices in buildings: because the common law has historically not admitted the notion of *condominium* available in other jurisdictions, in England, ownership in individual units that form part of a larger building is almost invariably structured by leases with attached positive covenants that ensure that the long leaseholder will keep the property in good shape[131] and that landlords will make such repairs in the case of short term leases. Thus, there seems to be little doubt that the ABC effect of leasehold covenants is justified because they are '*necessary for the effective operation of the law of landlord and tenant*',[132] this is, by policy reasons.

Although the ABC effects of leasehold covenants are contained within the privity of estates, the broad discretion private parties enjoy to shape their content seems fatal for the thesis advanced in Chapter 6.4, as it suggest that the *numerus clausus* is not aimed to ensure that successor in title will only be subject to low-intensity negative duties that preserve the basic exclusionary structure of property rights. However, this is not the relevant issue. Different to servitudes, leases do not give rise to 'cross-exploitation' of two different property modules, but to the 'temporal slicing' of a single

[127] See s. 3.
[128] Cooke (n 62) 187–189.
[129] See ss. 141 and 142 LPA 1925 and s. 3 Landlord and Tenant (Covenants) Act 1995.
[130] Lawson and Rudden (n 62) 120–121; Cooke (n 62) 192–193.
[131] Lawson and Rudden (n 62) 121.
[132] *City of London Corp v Fell* [1994] 1 AC 458, HL, at 464.

module. The challenges that 'temporal slicing' creates for the preservation of the functional transformability of property rights are different than those of 'cross-exploitation' and, therefore, call for a different substantive control.

In English law, such control relies on the exclusive possession and the term of years rules. The former ensures the functional transformability of the land by guaranteeing that leases will have the basic exclusionary structure of ownership. This effect is achieved by denying the nature of a lease, and therefore successor liability, to rights to occupy land that do not grant a right to exclusive possession to the tenant.[133] In turn, the term of years rule has double effect: first, it ensures that there is total certainty as to who will have ownership (and the ability to functionally transform the module of property) at any given point in time; and, second, it provides certainty to the freeholder as to the value of her reversion, therefore enabling her to trade it. In this manner, as in the case of easements, the substantive content-control that the *numerus clausus* imposes on leases ensures that there always exists a clearly identifiable persons with broad powers to functionally transform the thing. Using Larissa Katz's terminology,[134] it ensures that property remains 'an office' whose holder has the exclusionary powers to 'set the agenda' for the thing.

This mechanism is well illustrated by *Prudential Assurance*. By denying that a right to excusive possession over a strip of land for an uncertain term qualified as a lease, the court freed a piece of property that had been subject for more than half a century to a deal designed to solve a situation expected to last for a very short period. Its 'bizarre outcome', consisting of having a shop with no access to the street and a strip of land too narrow to be useful, was not created by the *numerus clausus*, but by a poor expropriation and urban planning, and could be easily solved by the parties by entering into a new lease. Arguably, the real force acting behind this case was the need to give the landlord a way out of a bargain that had become extremely one-sided over time,

[133] E.g., *Clarke* (n 119)
[134] See Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 U Toronto L J 275; Larissa Katz, 'The Regulative Funtion of Property Rights' (2011) 8 Econ Journal Watch; Larissa Katz, 'Property's Sovereignty' (2017) 18 Theo Inq L 299.

due to the impact of more than half a century of inflation over a fixed rent designed to last for a short time.[135]

(ii) The ABC effects of beneficial rights under trusts

As explained elsewhere,[136] beneficial rights under a trust are not subject to the principle of *numerus clausus*.[137] Thus, discussing the role of the *numerus clausus* in preserving the modular structure of beneficial rights seems out of place. However, as least since the 19th century, the English law of trusts has developed an array of doctrines that facilitate that ownership can pass from A to C free from B's beneficial rights.[138] As discussed in Chapter 3.1., recent comparative research has seen in this a development that paralleled the rise of the unitary notion of ownership in civilian systems,[139] which is indissolubly tied to the continental version of the *numerus clausus*. This suggests that, when successor liability is not limited by its substantive content, modern legal systems developed other mechanisms to preserve the functional transformability of the basic modules of property.

Besides the protection historically afforded to the *bona fide* purchaser acquiring for value from a trustee,[140] in contemporary English law, the most salient case in relation to land is probably overreaching. In a nutshell, overreaching allows the purchaser of land to take free from beneficial interests held under a trust, as long as certain requirements as to the payment of capital money are met, shifting B's beneficial right from the sold thing to the proceeds of the sale.[141] Thereby, overreaching protects C from non-standardized right created by an AB dealing by divesting the property upon

[135] See Susan Bright, 'Uncertainty in Leases - Is It a Vice?' (1993) 13 LS 38.
[136] See 3.3 and 7.2.
[137] Douglas and McFarlane (n 36) 240–241.
[138] William Cornish and others, *Law and Society in England 1750-1950* (2nd edn, Hart 2019) 171, 176–177.
[139] Michele Graziadei, 'The Structure of Property Ownership and the Common Law/Civil Law Divide' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 81–82, 87.
[140] On this, see Andreas Televantos, *Capitalism before Corporations: The Morality of Business Associations and the Roots of Commercial Equity and Law* (OUP 2021) 102–106.
[141] Payment of capital must be made to two persons, except when it is made to a trust corporation (s. 27 LPA).

conveyance and preserves the AB dealing by shifting its object to a new right. In the late 20th century this scheme was altered by the TOLATA 1996, arguably the '*most significant measure of property law reform since the legislation of 1925*',[142] to account for the fact that in contemporary England most dwellings are now owner-occupied by co-owners holding the land for residential purposes and not held as investments,[143] but this reform did not alter the core of overreaching. Finally, even when C is bound by B's beneficial rights, C does not automatically become subject to the duties the trustee owes to B, but is only liable to restore the rights dissipated in breach of the trust to the trustee or the person appointed by the beneficiary,[144] making the precise content of B's rights irrelevant to C.

The practical importance of trusts cannot be overstated. If servitudes allow a 'cross-utilization' of different properties and leases the 'temporal slicing' of ownership, trusts provide for its 'functional split': one or more parties manage the property while other parties get its benefits. In the two first cases, the ABC effects are contained by controlling the content of B's right. Trust law does not resort to this technique, because it would undermine its very core as a flexible instrument for the third-party management of wealth and resources. This does not deny the thesis advanced in this chapter, but confirms its main argument: preserving the functional transformability of property rights requires the law to contain successor liability. The trust shows that the principle of *numerus clausus* is not the *only* doctrine tasked with this function. In contexts where this principle is not applicable, other legal devices fulfil this function. In the case of trust law, this is done by limiting the enforceability of the rights of the beneficiary to remedies that are not dependent on the content of her rights and by doctrines that allow third parties to take free from her beneficial rights, such as overreaching.

[142] Charles Harpum, 'The Law Commission and the Reform of Land Law' in Susan Bright and John Dewar (eds), *Land Law. Themes and Perspectives* (OUP 1998) 169.
[143] Law Commission Report No 181, Transfer of Land: Trusts of Land (1989), [3.1.]-[3.5].
[144] Swadling (n 7) 213.

8.3. Germany: land servitudes, leases and flat ownership

(a) The doctrinal machinery of the dynamic protection of freedom

Analysing the impact of the *numerus clausus* on successor liability in German law presents challenges that are different from the English case. German doctrine offers a much clearer approach: the *numerus clausus* has enjoyed a well-established place in German doctrine for more than a century,[145] its historical origin can be easily traced to the protection of freedom of successors in title,[146] there is case law that explicitly applies it in ABC scenarios,[147] and doctrine has directly addressed the impact of changing circumstances on the law of servitudes.[148] However, due to the emphasis German doctrine puts on the conceptual aspects of the law and its uncontroversial status, the *numerus clausus* principle is normally approached in an abstract manner, that obscures its interactions with the wider context. Scholarship frequently provides no meaningful discussion of cases applying it[149] and, when it does, it normally focuses more on the conceptual account of the principle by courts than its relevance for broader social and economic phenomena.[150] In addition, because holdings directly applying the principle normally deal with refusals of the Landbook Office (*Grundbuchamt*) to register idiosyncratic property rights,[151] concrete examples of the impact of the principle in a context different to that of the original AB dealing are difficult to find.

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[145] See 4.2.
[146] See 6.3.
[147] See below.
[148] E.g., Rolf Stürner, 'Dienstbarkeit Heute' (1994) 194 AcP 265; Hermann Amann, 'Grunddienstbarkeiten Im Wandel Der Zeit Und von Verjährung Bedroht – Zugleich Anmerkungen Zu Den Urteilen Des BGH v. 18. 7. 2014 - V ZR 151/13 Und v. 22. 10. 2010 - V ZR 43/10' [2015] DNotz 164.
[149] E.g. Wellenhofer (n 1) 27, 28; Hans Hermann Seiler, 'Einleitung Zum Sachenrecht' in Elmar Bund and others (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Sellier & de Gruyter 2007) 23, 24; Klinck (n 3) 1274; Reinhard Gaier, 'Einleitung Zum Sachenrecht' in Franz Jürgen Säcker and others (eds), *Münchner Kommentar zum BGB* (7th edn, Beck 2017) [7].
[150] E.g., Jan Wilhelm, *Sachenrecht* (5th edn, De Gruyter 2016) 10; Holger Fleischer, 'Der Numerus Clausus Der Sachenrechte Im Spiegel Der RechtsÖkonomie' in Thomas Eger and others (eds), *Internationalisierung des Rechts und seine ökonomische Analyse. Festschrift für Hans-Bernd Schäfer zum 65. Geburtstag* (Gabler Verlag 2008) 126–127, 135 both discussing BayObLG NJW 1967.
[151] See below.

As a result, despite the clear link between the principle of *numerus clausus* and the control of successor liability, finding historically loaded examples to illustrate how this doctrine enables the functional transformation of property rights is not as easy as in England. This subsection overcomes this difficulty by discussing some cases where the *numerus clausus* was applied to scenarios that entailed *potential* BC conflicts and extrapolating what this might imply for the transformability of ownership; and by relying on the explicit historical relations that German doctrine draws between the control of limited property rights and the preservation of personal freedom, especially in the context of the judicial application of the law of servitudes.

(i) Protecting the exclusionary structure of ownership

Due to the central role that the Landbook has in granting property rights,[152] German case law explicitly applying the principle of *numerus clausus* frequently relates to registration problems. For example, the case normally cited by German scholarship to account for the judicial application of the *numerus clausus* concerned the registration of a mortgage that aimed to secure a number of obligations different than paying a sum of money, including constructing and maintaining a building, obtaining insurances and allowing inspection visits.[153] In this case, the BayObLG primarily relied on a pure doctrinal argument to uphold the refusal of the Landbook Office to register the mortgage, holding that § 1313 BGB only allows mortgages to secure obligations consisting in the payment of money and that the *numerus clausus* principle did not allow the creation of real rights for cases not foreseen in the law. However, the court also provided a policy argument to back its conclusion, holding that, otherwise, the Landbook could not fulfill its function consisting in accounting in reliable terms for all legal relations relating to land, arguing that legal traffic in the Landbook must be clear and certain to avoid third parties having any doubt as to the substantive content of the relevant property right.

[152] See 7.1.
[153] BayObLG, NJW 1967, 1373, 1374.

Cases involving other limited property rights follow a similar pattern. In a relatively recent case before the KG Berlin,[154] an owner (B) transferred the 'bare ownership' of a plot of land to A, while retaining the 'usufruct' for himself.[155] In the grant, the parties agreed that B would not be liable to A under the rules set forth in the BGB regarding the conservation of the thing (see §§ 1036, 1037 and 1041 BGB), that is, rules fulfilling a function similar to the common law of waste. The KG Berlin upheld a first instance ruling denying registration, arguing that, according to the *numerus clausus* principle, parties could not contractually create a usufruct that abrogated the usufructuary's duty of care. In a more recent case,[156] the OLG München upheld the decision of the Landbook Office not to register a personal servitude (*beschränkte persönliche Dienstbarkeit*) according to which the owner of the servient land came under the duty not to use a section of a public access road owned by the community (*Gemeinde*). The court argued that this grant did not match the content of a servitude as defined by the law, as it did not confer on its holder (the *Gemeinde*) any right over the servient land.

In these three cases, the court relied on the *numerus clausus* to prevent the grant of idiosyncratic property rights by denying registration in the Landbook to the AB dealings aiming to create them. Since in German law property rights in land can only be acquired by registration, in all these cases an actual ABC conflict, such as in *Keppell*, never arose. However, these cases can show how the *numerus clausus* preserves a doctrinal structure that enables the functional transformation of property rights by discussing how it protected *potential* successors from liabilities towards B.

In the case before the BayObLG, if registration had been permitted, an eventual successor of the grantor of the mortgage (C) would not have come under the duty to comply with the obligations her predecessor in title (A) secured by the mortgage. However, she would still have been exposed to lose her ownership in the thing, if A failed to comply with her obligations towards B. Thus, in practice, this would have

[154] DNoZ 2006, 470.
[155] A usufruct (*Nießbrauch*) is a real right to use and obtain the profits of a thing. This right leaves its owner with the 'bare' or 'nude' ownership of the land, see §§ 1030, 1059, 1061 BGB.
[156] NJW-RR 2011, 1587.

made C liable to B. The policy argument put forward to deny proprietary nature to such a grant holds that it would jeopardise the free circulation of land. This already points to how, in this case, the *numerus clausus* protected the functional transformation of property rights: by providing certainty, it facilitates the acquisition of land by people who can better use it under new circumstances.

However, the real question is why A is allowed to grant a mortgage that binds C to secure her obligations to pay a sum of money, but not for other types of obligations. From the perspective of the functional transformation of land, an answer can be found in the ease with which C can comply with the liability the mortgage imposes on her: in practice, C can achieve an effect equivalent to divesting the mortgaged land by paying the money A owes to B (see §§ 1143, 1153, and 1177(2) BGB), freeing the land for new uses and facilitating its circulation in the market. This effect could not be easily achieved if the parties were allowed to create mortgages to secure other type of obligations. For example, in the BayObLG case, an eventual C would have needed to fulfil several detailed tailored obligations crafted for a specific developer or building company, including constructing and preserving a building, which is the opposite of freeing the land.

Similarly, in the case before the KG Berlin, the refusal of the Landbook Office to register an idiosyncratic usufruct avoided the creation of a property right that might have jeopardized the functional transformability of land. German doctrine is well aware of the problem usufructs create for the circulation of wealth, seeing the rules that forbid its transfer and limit its maximal duration to the life of its holder as the main substantive control to ensure that the land will become fully disposable by one single person at some point not too far removed in time.[157] However, these rules might not be enough to ensure that the ownership split by the usufruct retains a high level of functional transformability. For example, in the KG Berlin case, B attempted to create a non-standard usufruct by gifting the bare ownership to A. Before the court, A and B

[157] E.g., Klinck (n 3) 1385; Jörg Mayer, 'Dienstbarkeiten' in Wolfgang Wiegand (ed), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 3. Sachen Recht. EbbVo; §§ 1018-1112* (Sellier & de Gruyter 2002) 221.

defended their agreement arguing that it did not make sense that B, being originally the full owner, became forced to assume more liability regarding the use of the thing than he had before because of gifting the bare ownership over it to A. From a static perspective, the argument of the claimants seems sound. Due to the gratuitous nature of their deal, it is possible to assume that A and B were personally related (probably, parent and child) and, for sure, the deal made sense *for them*, probably for tax reasons.[158] However, from a dynamic perspective, the creation of a usufruct that imposes only minimal liability on the possessor of the thing creates significant problems. Usufructs last for the life of its holder (§ 1061 BGB), giving her absolutely no incentive to preserve the thing in a manner that will allow new uses of it after the expiration of her right. As long as A and B have a personal relation, as in the KG Berlin case, this might not be a problem, because B will have an idiosyncratic reason to care for the thing. However, if A transfers the bare property to C, B might have no reason to care for the thing. For the same reason, if A wants to transfer the bare ownership to a third party, she will struggle to find a buyer.

The effects avoided by the KG Berlin show the negative impact of allowing non-standardized usufructs: it freezes the use of the property into an idiosyncratic AB dealing until the expiration of the right, jeopardizing its marketability and functional transformability. The *numerus clausus* avoids this effect by standardizing the core of the relation between the holder of the usufruct and the bare owner by means of 'statutory obligational relations'[159] and denying ABC effects to agreements that deviate from this core.[160] This does not impede the creation of a right that suits the personal nature of the relation between A and B. As suggested by the court, they could have relied on the law of obligations for that purpose.[161] By this means, the *numerus clausus* allows complex interactions between parties that are tailored for a specific scenario, while it also keeps such deal contained within the original relation, allowing successors in title to take free from its idiosyncratic aspects.

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158 On the tax motivation of usufructs, Baur, Baur and Stürner (n 2) 411.
159 On these relations, see 7.1.
160 Sebastian Herrler and Hartmut Wiecke, 'Sachenrecht', *Palandt. Bürgerlicher Gesetzbuch mit Nebengesetzten* (80th edn, Beck 2021) 1677. Although some modifications of this relations are admitted, as long they are registered, Baur, Baur and Stürner (n 2) 414.
161 [3].

(ii) The content of successor liability

In the BayObLG and the KG Berlin cases, the *numerus clausus* preserved the functional transformability of land by preventing the creation of idiosyncratic forms of successor liability. However, as shown above with the example of English servitudes, the German *numerus clausus* does not only work by excluding successor liability, but by channelling it into standardized forms that ensure that, even if C becomes liable to B, she will retain enough freedom to decide how to use 'the thing' and, that any limitations on her freedom will be justified by sound policy considerations. For many limited property rights, including usufructs and personal limited servitudes, this works in an extremely simple manner: such rights cannot be transferred by B and expire upon her death, ensuring that the full ownership will be reunited sooner or later, normally in C. However, German law also provides for limited property rights that permanently split the use of land, most notably, land servitudes (*Grunddienstbarkeiten*). This subsection will account for the mechanism by which German law channels successor liability in these cases, focusing on the problem of the 'eternal servitude' (*ewige Dienstbarkeit*').[162]

In German law, land servitudes belong to the larger group of 'servitudes' (*Dienstbarkeiten*), which also comprises 'limited personal servitudes' and 'usufructs'.[163] Personal and land servitudes, unlike usufructs, can only exist in land and only admit a limited use of it. Land servitudes, unlike personal servitudes and usufructs, need to be attached to a dominant land and have an everlasting nature. By contrast, personal servitudes and usufructs can be granted in gross, but cannot be transferred and expire upon the death of their holder.[164]

As in England, the doctrinal elements of German servitudes (see § 1018 BGB), were borrowed from Roman law,[165] reflecting the same basic structure of easements and

[162] See Mayer (n 157) 222.
[163] Wellenhofer (n 1) 523; Mayer (n 157) 200–204. For a slightly different categorization including 'real charges' (*Reallasten*), Baur, Baur and Stürner (n 2) Chapter 4.
[164] Baur, Baur and Stürner (n 2) 415, 416; Herrler and Wiecke (n 160) 1666.
[165] Mayer (n 157) 205–206.

restrictive covenants. Servitudes can only impose duties to withhold from doing something (*zu unterlassen*) or to tolerate the dominant owner doing something on the servient land (*zu dulden*), but not a positive doing.[166] The BGB also restricts the content of these duties in a manner that resembles the English ouster principle. First, 'duties to withhold' must be specific and cannot give an encompassing right to use the servient land, not even a section of it, as this would amount to a usufruct. Second, 'duties to tolerate' must leave a meaningful use of the land to the servient owner, including freedom to dispose of the land, grant contracts over it, transform it, etc.[167] Finally, as with the English accommodation tests, according to § 1019 BGB, land servitudes also require that the burden on the servient land provides an 'advantage' for the use of the dominant land. Although, different to English law which does not admit easements in gross,[168] if this fails, the burden can normally still be created in the form of a limited personal servitude. According to German scholarship, a further difference is that what amounts to an advantage to land in German law is broader than in England.[169] Indeed, German doctrine holds that land servitudes have a 'surprisingly open content'.[170]

Different to easements and restrictive covenants, which are essentially based in the common law, the structure of the German law of servitudes is the outcome of a conscious legislative choice. The drafters of the BGB opted for the second of two models: the pre-existing ALR, which had an open system that allowed the 'proprietarization' (*Verdinglichung*) of practically any personal right; and the Roman tradition of the Pandectist School, which favoured a closed system of standardized rights, opting for the latter.[171] This was not only a result of the 'academic triumph' of the Pandectist School over the Germanic school,[172] but an ideological choice in favour of modernity.[173] Traditional German law admitted entitlements called *Gerechtigkeiten*,

[166] Baur, Baur and Stürner (n 2) 417, 418, 422; Wellenhofer (n 1) 525–528; Herrler and Wiecke (n 160) 1667–1669.
[167] Herrler and Wiecke (n 160) 1668–1699.
[168] *London County Council v Allen* [1914] 3 KB 642 (CA).
[169] E.g., Stürner (n 148) 278. Whether *Regency Villas* closed this gap remains to be seen.
[170] E.g., Mayer (n 157) 199–220, my translation.
[171] Stürner (n 148) 276.
[172] RC van Caenegem, *An Historical Introduction to Private Law* (CUP 1992) 155–156.
[173] See Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung* (3rd edn, Vandenhoeck & Ruprecht 2016) 620; Mayer (n 157) 220.

which focused on the right of the holder, not on the correlative duty. They came in a variety of forms and created heavy duties on landholders. The restrictions on the content of servitudes imposed by BGB were explicitly aimed to avoid the creation of these rights and should be seen as part of the wider effort to 'free land' from pre-modern agrarian proprietary structures.[174] Indeed, somehow paralleling the English discussion on cross-exploitation of land,[175] contemporary German doctrine often frames the same problem in terms of 'freedom'. For example, Rolf Stürner explains that '*ownership is a piece of personal freedom and servitudes, by their own nature, restrict such freedom for the benefit of the freedom of someone else*'.[176]

German scholarship often discusses to what extent the restrictions that the *numerus clausus* imposes on servitudes prevent and should prevent private parties from creating new types of rights that adjust to new needs.[177] Pushed by relatively recent case law,[178] the most debated topic currently is the risk that the everlasting nature of land servitudes entail for the flexibility of property law. Textbooks[179] and *Kommentare*[180] invariably discuss to what extent land servitudes granted in a certain factual context can be adapted to new circumstances, that focuses on the functional transformation of already existing grants, a phenomenon sometimes labelled as 'dynamic modification' (*dynamische Veränderung*) of servitudes.[181] As in *Regency Villas*, the requirement that land servitudes have to provide an advantage to the dominant land holds the key to this doctrine: as long as a servitude can be exercised according to its original purpose, it will subsist, and it might even impose a heavier burden on the servient land, if such burden has the same 'scope'.[182] Thus, changes caused by technical developments that remain in the same framework are allowed.[183]

[174] Baur, Baur and Stürner (n 2) 429.
[175] See 7.2.
[176] Stürner (n 148) 265, my translation.
[177] E.g., Stürner (n 148).
[178] See Mayer (n 157) 222.
[179] E.g., Wellenhofer (n 1) 529, 530; Baur, Baur and Stürner (n 2) 420–422.
[180] E.g., Herrler and Wiecke (n 160) 1671; Mayer (n 157) 222.
[181] E.g, Mayer (n 157) 222.
[182] Wellenhofer (n 1) 529; Baur, Baur and Stürner (n 2) 421.
[183] Mayer (n 157) 222.

The flexibility that this rule impresses on the law of servitudes is apparent in a recent holding of the BGH.[184] The case concerned a servitude to pass through a driveway with '*wagons of any kind*' (*Fuhrwerke jeder Art*),[185] this is, vehicles pulled by animals. The holding does not provide the date of the grant, but according to Hermann Amann, it is apparent that this was before motorized vehicles were of importance,[186] probably a hundred years before the case reached the court. The defendant claimed that the servitude had expired, arguing among other things, that it did not allow the passing of motorized vehicles. The BGH rejected the argument holding that '*the content and scope of a temporally unlimited easement (…) is not fixed in every aspect from the outset for all times, but is subject to changes resulting from economic and technical developments'*, concluding that a *'right of way granted to drive "wagons", today, includes driving both cars and lorries'* and that the *'resulting increase in the burden [on the servient owner] remains within the scope [… as] driving with a wagon corresponds to driving with a motor vehicle today'.*[187] The key implications of this is that courts can use the open-ended terms of a grant to adapt existing servitudes to new settings.

(b) The modern home

The previous subsection argued that the restrictions that the German *numerus clausus* imposes on successor liability keep property rights ready for change by preserving the exclusionary nature of the basic modules of property law. As in English law, this is mainly achieved by ensuring that property rights running with land will be negative in nature and will not deprive C from meaningful ownership. However, German law has cases that do not follow this rationale. As in England, these cases primarily arise in the context of modern housing. The BGB rules on land leases allow the creation of successor liability outside the *numerus clausus* of property rights; while the WEG provides for a complex system for the creation of duties running with flats that are not controlled by their content. This subsection discusses what this implies for the thesis advanced in Chapter 6.4.

184 BGH 18.7. 2014 - V ZR 151/13.
185 *Ibid* [1].
186 Amann (n 148) 164.
187 [7], my translation.

(i) Social lease law

The social and economic importance of leases in Germany can hardly be overestimated. As of today, about 60% of the German population 'live on the lease' (*zur Miete wohnen*).[188] This might not impress a common lawyer used to thinking of leases, especially long-term leases, as temporal ownership. However, in Germany, leases are not legally conceived nor socially perceived as property rights,[189] giving rise to one of the most distinctive features of German homeownership within the European context: an uncommonly low rate of homeowners.[190]

The fact that German law does not conceptualize leases as property rights seems to place them outside the scope of this research. Nonetheless, German doctrine also acknowledges that leases have 'some proprietary elements',[191] especially in the residential context.[192] From the perspective of private law, § 566(1) BGB establishes that the successor in title to the lessor '*takes over the rights and duties that arise under the lease agreement during the period of his ownership*'. However, because German leases are not categorized as property rights, this ABC effect is not subject to the principle of *numerus clausus*. This does not undermine nor advance the thesis advanced in Chapter 6.4, but points to a different implication: as in England, the German *numerus clausus* simply does not control all cases of successor liability. In these scenarios, ABC effects are controlled by other means, which might respond to different rationalities. In the case of German leases, this is done by a dense and rapidly evolving legislative intervention, which can only be understood from an historical perspective.

Following the heavily Romanised approach of the Pandectist School,[193] the EI adopted the basic principle that acquirers of land were not bound by pre-existing leases and

188 Emmerich (n 25) 954.
189 To understand why, see (ii) below.
190 For a non-academic comment, James Hawes, *The Shortest History of Germany* (Old Street 2018) 214–215.
191 Baur, Baur and Stürner (n 2) 393; Emmerich (n 25) 566, 567.
192 Emmerich (n 25) 956.
193 See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996) 378, 379.

were free to evict lessees at any time. This created an outrage in public opinion, leading the second draft to adopt the rule that 'sale does not break a lease'.[194] However, rules on leases were essentially dipositive and provided that both parties were normally allowed to terminate the contract at any moment.[195] In the early 20th century, the far greater bargaining power of lessors enabled them to impose standard forms on tenants that allowed them to terminate leases unilaterally on very short notice.[196] Thus, in the mental framework of Wilhelmine Germany, § 566(1) BGB did probably not pose any serious threat to the preservation of the freedom of owners: in the spirit of the political ideas that inspired the BGB,[197] its drafters assumed that the market would provide a steady supply of homes that would allow tenants to rapidly find new accommodations.[198]

In practice, the market did not provide enough homes for rent. There are many explanations for this: destruction of capital by the 1923 hyperinflation, competition with armament production during the 1930s, war destruction, massive arrival of refugees from the east in the aftermath of Second World War, guestworkers during the Postwar period and, more recently, asylum seekers. This structural housing shortage led to the development of a 'law for the protection of tenants' (*Mieterschutzrecht*) that is essentially concerned with limiting the rights of the lessor to terminate the contract and to raise the rent.[199] This intervention started in 1917, pushed by the growing housing needs created by the First World War and resumed in 1936, and created a massive 'emergency lease law' (*Mietnotrecht*) that provided for a 'forced housing economy' (*Wohnungsbewirtschaftung*). This system was only dismantled progressively after 1966 and replaced with a 'social lease law', based on strong protection of lessees *vis a vis* lessors. During the 1970s a renewed rise in rents led to the passing of new acts strengthening the protection of lessees that were embodied in the BGB, becoming

194 Emmerich (n 25) 982.
195 See Baur, Baur and Stürner (n 2) 934; Emmerich (n 25) 954.
196 See Christoph Bernhardt, *Bauplatz Groß-Berlin. Wohnungsmärkte, Terraingewerbe Und Kommunalpolitik Im Städtewachstum Der Hochindustrialisierung (1871-1918)* (De Gruyter 1998) 20.
197 See Heinrich Honsell, 'Einleitung Zum BGB' in Dagmar Kaiser and Markus Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (6th edn, Sellier & de Gruyter 2018) 13, 14.
198 Baur, Baur and Stürner (n 2) 394.
199 ibid 395.

'permanent law' (*Dauerrecht*).[200] In 1993, the BVerfG upheld these rules, holding that the position of lessees counts as ownership under Art. 14 GG.[201] In 2001 leases were newly regulated in the BGB (§§ 549ff BGB),[202] further strengthening the position of lessees.[203] Since then, the law of leases has experienced further reforms, including the passing of an act to facilitate some modernizations in the context of the German 'energy transition' and, after 2015, a variety of special acts limiting the raising of rents, the so called 'rent brakes' (*Mietpreisbremsen*).[204]

It is widely accepted in German doctrine that the ABC effect of leases is justified by its 'social function', particularly by the protection of the 'status of the lessee' (*Bestandsschutz des Mieter*),[205] which was confirmed by the 1993 ruling of the BVerfG.[206] In other words, the successor liability of the lease is justified by pure (external) policy considerations. Indeed, from an internal perspective, the rule that 'sale does not break a lease' has been regarded as a 'dogmatic anomaly'.[207] From a technical perspective, this effect is achieved through a 'contractual transfer ordered by law', that is not dependent on registration nor notice.[208] Bringing to mind the protection of interests of those in actual occupation under the LRA 2002,[209] the operation of § 566 BGB only requires the lessee to be 'in possession at the time of the transfer'. There are different views on the doctrinal operation of this mechanism,[210] but whatever option is followed, its basic effect has been described as creating an outcome similar to a limited property right for the use of land.[211]

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[200] On the evolution of lease law, see ibid; Emmerich (n 25) 955; Stefan Kofner, *Wohnungsmarkt Und Wohnungswirtschaft* (Oldenburg Verlag 2004) 158–174.
[201] BGH, NJW RR 1993, 2025.
[202] 2001 Mietrechtsreformgesetz, BGB1. I 1149
[203] Baur, Baur and Stürner (n 2) 395.
[204] See Emmerich (n 25) 955; Walter Weidenkaff, 'Einzelene Schuldverhältnisse. Titel 5. Mietvertrag, Pachtvertrag', *Palandt. Bürgerlicher Gesetzbuch mit Nebengesetzten* (80th edn, Beck 2021) 765.
[205] Baur, Baur and Stürner (n 2) 392.
[206] See n 201.
[207] Zimmermann (n 193) 382.
[208] Baur, Baur and Stürner (n 2) 398.
[209] See Sch 3. Para. 2.
[210] See Emmerich (n 25) 982.
[211] E.g., Baur, Baur and Stürner (n 2) 399.

As leases do not create property rights, the *numerus clausus* does not play any role in controlling their ABC effect. Notably, in the case before the KG Berlin mentioned above, the court held that the agreement derogating the duty of care of the holder of the usufruct would have been admissible if the parties had agreed on a lease, as leases only give rise to obligations.[212] However, this does not imply that parties can use leases to freely create duties running with land. Rights and duties running with leases are only those 'pertaining by nature to the lease' (*mietvertragliche Rechte und Pflichten)*. The decisive factor for this is whether the agreement in question 'forms a part of the lease' (*ob die Abreden Teil des Mietvertrag bilden).*[213] Scholarship has systematized the relevant criteria through case groups,[214] but the general picture seems too vague to draw a general conclusion. In any case, this arrangement seems completely at odds with the substantive modular view of property rights advanced in Chapter 6.4. However, this is not the relevant reading. The key outcome is that due to the intense and detailed legislative intervention that has characterized German lease law since the early 20th Century,[215] the content of leases is essentially established by statutory law that provides limited space for idiosyncratic agreements, turning the discussion about the 'nature' of the obligations running with land and the protection of C secondary. By the same token, keeping the law of leases in step with social needs also requires constant legislative intervention, making it a topic of frequent controversy. For example, in March 2021, a 'rent brake' enacted by the City of Berlin[216] was struck down by the BVerfG arguing that this was a matter already covered by the 2015 Rent Brake Federal Act.[217] In such context, the control of the free delineation of duties running with leases simply does not seem to be an important issue.

[212] [3].
[213] Emmerich (n 25) 983, 984.
[214] E.g., see Weidenkaff (n 204) 865.
[215] See in general, Valesca Maria Molinari, *Die Tradition Staatlicher Interventionen in Den Mietwohnungsmarkt* (Mohr Siebeck 2021).
[216] MietenWoG Bln.
[217] BVerfGE, Beschluss des Zweiten Senats vom 25. März 2021

(ii) Re-modularization of ownership

The relatively little attention that German doctrine devotes to the positive obligations that run with leases can be explained by the scarce importance leases have in articulating 'horizontal ownership' in civilian systems. Different to common law leaseholders, civilian tenants do not own a right they can transfer: B's lease is binding on A's successor in title C, but B cannot transfer its right to B2. As in other civilian jurisdictions, German law has a specific type of property right to allocate individual ownership in a separate part of a building, namely, 'flat ownership' (*Wohnungseigentum)*. Flat ownership was enacted by the WEG as part of a wider effort to overcome the housing crisis of Postwar Germany. The relevant implication is that, sometimes, the modular structure of property law preserved by the *numerus clausus* is not capable of accommodating the demands of social and economic change, making the legislative creation of brand-new property modules indispensable to cope with new realities.

Following the Roman 'accession' principle, the BGB established that buildings are part and parcel of the land and cannot be subject to separate property rights (§§ 94(1) and 93 BGB),[218] save for a very weak form of *superficies* right.[219] This decision was motivated by both doctrinal and practical considerations. On the one hand, the drafters of the BGB saw the undivided ownership of land and building as essential for fluid legal traffic and safeguarding the personal autonomy of individual owners.[220] On the other, they wanted to avoid the frequent disputes created by the pre-existing French-inspired 'floor ownership'.[221] Thus, it is not hard to see that the decision of the drafters of the BGB was underpinned by the desire to create very stable and robust modules

[218] Manfred Rapp, 'Einleitung Zum Wohnungseigentumgesetz' in Wolf-Rüdiger Bub and others (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen.* (13th edn, 2005) 64–65.
[219] Manfred Rapp, 'Ebrbaurecht' in Wolfgang Wiegand (ed), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 3. Sachen Recht. EbbVo; §§ 1018-1112* (2002) 3–4.
[220] Rolf Stürner, 'Sachenrechtsbereinigung Zwischen Restitution, Bestandsschutz Und Rechtssicherheit' (1993) 48 JZ 1074, 1075.
[221] Baur, Baur and Stürner (n 2) 375.

of land ownership that could easily circulate in the market[222] and be re-deployed to new uses by new owners, without having to face anti-commons problems.[223]

By the end of the Second World War, West Germany was experiencing a catastrophic housing crisis.[224] The only way out of it was to create new housing space, which became one of the central concerns of the first elected Federal Parliament (*Bundestag*).[225] Within a broader policy design,[226] the widespread distribution of homeownership was seen as central and, with most people having lost almost all their savings due to the 1948 currency reform,[227] the 'accession' ownership model of the BGB seemed hopeless. Thus, homeownership could only be achieved by allowing the acquisition of property in individual flats, this is, by creating a new module of property called 'flat ownership'.[228] Such right is equivalent to ownership in land,[229] but is insolubly united with co-ownership over communal property (e.g., the land) and membership in a community of flat-owners that manages the communal property.[230] This is described by German doctrine as a total break with the ownership concept of the BGB[231] that could never have been achieved through judicial gap filling,[232] and is a cornerstone of the policies than ended the housing crisis by the 1960s.[233]

[222] See Henry Hansmann and Reinier Kraakman, 'Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights' (2002) 31 JLS 373, discussed in 6.2.
[223] See Heller (n 100), discussed in 6.2.
[224] See Kofner (n 200) 154.
[225] Rapp (n 218) 65, 67.
[226] See Baur, Baur and Stürner (n 2) 375–376.
[227] See Christoph Buchheim, 'Die Währungsreform 1948 in Westdeutschland' (1988) 36 Vierteljh Zeitgesch 189.
[228] See Rapp (n 218) 8.
[229] ibid 15.
[230] ibid 8; Hartmut Wiecke, 'Gesetz Über Das Wohnungseigentum Und Das Dauerwohnrecht', *Palandt. Bürgerlicher Gesetzbuch mit Nebengesetzten* (80th edn, Beck 2021) 3001.
[231] Rapp (n 218) 67.
[232] Karl Larenz and Claus-Wilhelm Canaris, *Methodenslehre Der Rechtswissenschaft* (3rd edn, Springer 1996) 191, 194, 196.
[233] See Kofner (n 200) 154, 157–158.

8.4. Conclusions

In both England and Germany property rights create successor liability. However, the doctrinal relevance of this form of liability varies between the jurisdictions: as mentioned in Chapter 3, in England successor liability is enough to classify a right as a property right, while, in Germany it is not. Nonetheless, from a purely functional perspective, both jurisdictions provide, in one way or another, for a category of rights that can bind successors in title (C), but not strangers (X). In England these are typically equitable property rights, while in Germany they are a handful of anomalous obligations.

It is beyond doubt that the *numerus clausus* principle imposes substantive constraints on the ABC effects of English legal property rights and on most equitable property rights, as well as on German property rights. Overall, the content of these constraints is very similar in both jurisdictions. For property rights that provide for the cross-exploitation of land (e.g., servitudes), the impact of the *numerus clausus* is straightforward: the principle is aimed to ensure that duties running with land will be essentially negative and will not deprive the holder of the servient land from meaningful ownership. Rights that fail this test will not come into existence or will only be enforced as obligations, and so will not trigger ABC effects. Similarly, property rights that provide for the temporal slicing of ownership (e.g., English leases and German usufructs) must also fulfill substantive requirements that ensure that there will, at any point in time, be a party with a broad degree of freedom in using the thing, as apparent in the requirement that both the English lease and the German usufruct must provide 'exclusive possession' to its holder and have a limited duration. Temporal slicing that does not comply with this requisite will fail to become a property right.

This substantive design provides property law with three inherent sources of flexibility. At the most basic level, the *numerus clausus* forbids the creation of idiosyncratic property rights that might jeopardize the transferability and functional transformability of land. In the short run, this might seem to bring rigidity into the property systems, as it limits the ability of private parties to deal with new circumstances. However, in the

long run, it preserves the flexibility of property law by 'resetting' ownership upon transfer. This effect is very tangible in cases such as *Keppell* and a similar outcome is achieved in the German cases dealing with Landbook Offices refusing to register agreements aiming to create non-standardized property rights. The impact of this restriction on party autonomy should not be overestimated, as often a similar practical outcome can be achieved by a thoughtful use of the existing modules of property. For example, in *Regency Villas*, the court suggested that a practical outcome equivalent to a previously not allowed easement could have been achieved by using leasehold covenants, while in the KG Berlin case the court argued that a similar outcome could be achieved through a lease.

Second, by the same token, the *numerus clausus* works by channeling successor liability into standardized forms that are inherently designed to preserve the freedom of the party burdened with the duty. In England and Germany this mechanism is best seen at work in doctrines imposing *ex-ante* controls on the creation of servitudes. In both jurisdictions, servitudes can regularly only impose abstention duties on the servient owner and cannot deprive her from meaningful freedom in the use of her land. A similar rationality is seen in the content-control of property rights that provide for the temporal slicing of ownership, although the main concern in these cases is providing clear limits on the duration of the temporal right. In England, this is accomplished by the term of years rule, while in Germany a similar effect is achieved by making usufructs expire upon death of its holder and forbidding its transfer.

Third, English and German property law deal with changes in economic and social circumstances by relying on some open-ended doctrinal elements as gateways for the incremental judicial re-configuration of property rights. This can be seen at work in the laws of servitudes. On the one hand, the open-ended nature of the accommodation test has allowed English courts to admit new forms of easement that would previously have been seen as mere obligations, as in *Regency Villas.* On the other, the German doctrine of dynamic modification of land servitudes has allowed courts to adapt property rights granted a century ago to contemporary circumstances, as in the case of the horse-drawn wagons.

However, another part of the capability of English and German property law to adapt to new circumstances is not explained by the *numerus clausus*, but by its absence. Both jurisdictions have broad areas in which the creation of ABC rights by private parties is not subject to strong content-controls. In English law, the most obvious case is the trust, offering private parties a residual category to freely delineate rights with ABC effects,[234] but subject to other restrictions not solely based on their content. Another relevant case is the flexibility that parties enjoy in creating leasehold covenants within the privity of estates. In Germany, the latter is partially mirrored by the effect of the 'sale does not break a lease' rule, although its practical importance is less acute, as leases are not required to articulate horizontal ownership. This shows that the *numerus clausus* is less pervasive than frequently assumed, as it does not cover all cases of successor liability.

Finally, the brief discussion on German flat ownership shows that, nonetheless, a modular system of property rights has a limited ability deal with social and economic change: sometimes legislative 're-modularization' of the system is required.

These remarks trigger an unavoidable question: if property law is as flexible and dynamic as suggested, why is its static and rigid image so persistent? This question will be answered in Chapter 9, as part of the overall conclusion of this dissertation.

[234] See Dagan and Samet (n 38) 19–20.

CHAPTER 9

CONCLUDING REMARKS

9.1. Solving the paradox of property law

This dissertation was motivated by a paradox that seems inherent to many contemporary property systems: how can an area of private law made of a fixed list of rights, frequently described as static and rigid, accommodate the demands created by a vast array of changes, without undergoing noticeable transformations? Instead of denying the paradox, this dissertation has opted to embrace it,[1] arguing that the very legal principle that creates the paradox -the principle of *numerus clausus*- provides modern property systems with an 'internal' or 'doctrinal' structure that allows them to deal with changing social needs, while retaining their stability. In this view, property law does not change often because *it does not need to change*. However, this dissertation has also shown that this ability of property law to 'self-regenerate'[2] is not infinite: sometimes property law requires 'external' re-modularization[3] of its structure to keep in step with social needs. This subsection will develop these two points.

(a) The *numerus clausus* and the doctrinal structure of property law

The ultimate justification of the *numerus clausus* principle remains contested but, as argued in Chapter 6.4, in operative terms, the principle works by standardizing property rights in a manner that preserves the liberty of third parties, including those who have property rights, whether in the same thing or in another thing. This liberty enables private parties to 'functionally transform'[4] the object of their property rights in light of changing circumstances. In other words, by limiting the effects private dealings can have on third parties, the *numerus clausus* ensures that the property system will

[1] See 1.1.
[2] Using wording from Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale LJ 1, 56.
[3] Borrowing from Henry E Smith, 'Property as the Law of Things' (2012) 125 Harv L Rev 1691, 1724 discussed in 1.4 and 1.5.
[4] Borrowing from Karl Renner, *The Institutions of Private Law and Their Social Functions* (Agnes Schwarzschild tr, Routledge and Kegan Paul 1976).

retain a 'modular structure',[5] that allows private parties to re-deploy existing property rights in the face of new realities. Thereby, this thesis not only provides evidence that supports the modular theory, but also highlights its close connection with the *numerus clausus* principle.

This is not result of chance, but the outcome of the push of a variety of economic and ideological forces during the 19th century, which gave the property laws of England and Germany a structure that is inherently capable of dealing with the changes of a modern world. The key to understanding how the *numerus clausus* achieves this end is in the realization that, as discussed in Chapter 3, property rights, in both civilian and common law systems, have two distinctive effects that should not be confused: trespassory and successor liability.[6] In both Germany and England, the effect that the *numerus clausus* has on trespassory liability is close to absolute. Save for certain low-intensity duties that cannot really be explained as correlative to a proprietary interest,[7] private parties can generally not create new and additional duties upon strangers, unless authorized by the law. As shown in Chapter 7,[8] by this means the *numerus clausus* facilitates the functional transformation of property rights by limiting the number of people towards whom strangers might become liable in tort while they exercise a Hohfeldian liberty over their own property. In effect, the *numerus clausus* creates a firewall that ensures that dealings between A and B will not affect the modular nature of the property right owned by strangers (X).

The effect that the *numerus clausus* has on successor liability is harder to assess. However, in most cases, the impact of the *numerus clausus* on this form of liability is apparent. Either because rights that have ABC effects are the same as rights triggering trespassory liability or because they mirror their content,[9] most rights creating duties

[5] Borrowing from Smith (n 3); Henry E Smith, 'Economics of Property Law' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 2: Private Law and Commercial Law* (OUP 2017).
[6] Using the terminology of James Penner, 'Duty and Liability in Respect of Funds' in John Lowry and Mistelis Loukas (eds), *Commercial Law: Perspectives and Practice* (Lexis Nexis Butterworths 2006) 215.
[7] As the tort of inducing the breach of a contract. See 7.1.
[8] E.g, with the case of the pub owner in *Hill v Tupper*, 2 H & C 121, 159 ER 51 and the developer *in Hunter v Canary Wharf* [1997] AC 665, HL.
[9] See 8.1 on the doctrine of anticipation.

'running with the asset' are also subject to a content control, which aims to preserve the modular structure of property law. As shown in Chapter 8, the standardized content of ABC rights varies depending on whether the right provides for the 'cross exploitation of land' or the 'temporal slicing of ownership', but the ultimate rationality of their content is ensuring that successors in title (C) will retain a module of property that will grant them discretion enough to functionally transform it and that any limitations of such power will be off-set by enduring policy benefits. In addition, because the standardization of most ABC rights relies on semi open-ended terms, parties can fit new variants of the same right within the same conceptual structure, as long as judges are prepared to find that the policy reasons justifying them are sufficiently enduring. [10]

The difficulty in assessing the impact of the *numerus clausus* on successor liability is, to a large extent, explained by the existence in both England and Germany of a group of ABC rights that do not seem to be controlled by their content. English doctrine is accustomed to treat such rights (especially beneficial rights under a trust), as part of property law; while German doctrine tends to see these cases as obligations with far-reaching third-party effect (e.g., the right of the lessee of land).[11] However, their creation is not entirely free nor without restrictions. In these cases, modern property law has developed other doctrines either to limit the ability of A and B to impose duties on a successor in title[12] or to provide for means in which successors can take property free from such duties.[13] These cases show that the *numerus clausus* is not as stringent for successor liability as it is for trespassory liability, providing to parties dealing with property rights a certain level of freedom to delineate their rights in some key contexts, including wealth management and housing.

[10] See discussion on the 'accommodation test' of English easements and its German functional equivalent in 8.2 and 8.3
[11] See 3.4(a).
[12] E.g., the limited nature of the duties beneficial rights in a trust impose on successor in title. See 8.1.
[13] E.g., overreaching in English law. See 8.2

(b) Re-modularization

This dissertation has also shown that the functional transformability of property rights does not have an unlimited capability to deal with new realities: sometimes the building blocks of property law need to be reformed from outside. As argued in Chapter 5, under the principle of *numerus clausus*, in both England and Germany, this task is primarily for legislators. However, as shown in Chapter 4, occasionally this function is assumed by judges, which, arguably, qualifies as a breach of the *numerus clausus*. This suggests that property law is also not as static as normally portrayed and is consistent with the occasional need for re-modularization of Smith's architectural theory. The pending question is why this has not affected its static aura.

Contemporary legislators re-shape the modules of property law through two very distinctive forms of legislative intervention. The first, briefly discussed in Chapter 3, is by the enactment of a vast body of public law regulation that alters the building blocks of property rights 'from outside' private law, normally by limiting the uses owners can make of their things.[14] Although it is clear that the impact of regulation in contemporary societies is massive, this phenomenon has not altered the static perception of property law. To a large extent, this may be because the impact of regulatory changes over property rights is normally channelled through constitutional law doctrines that operate in parallel to private law, such as the American doctrine of regulatory takings, the development of a separate constitutional concept of ownership by the BVerfG or the supremacy of the UK Parliament. Nonetheless, the impact of regulation on property law is visible at many levels. For example, in the context of Anglo-American property theory, this has left an enduring legacy in the form of the bundle of rights metaphor;[15] while in Germany, the acknowledgment of leases as a form of property under the GG and the constant growth in importance of rent controls seem to have substantively affected the contractual nature of leases.[16] More research is required to develop a clearer conceptual picture of the impact regulation has on property law.

[14] E.g., the German regulation protecting the environment and animals. See 3.2.
[15] See 3.2 and 3.4.
[16] See 8.3.

The second form of re-modularization is 'internal' to private law and consists in the open alteration of the existing modules of property or the creation of new ones through legislation. The common perception seems to be that this only happens in rare cases. However, the impact of legislative reform in property law should not be underestimated. In England, the 1922-1925 land reform radically re-modularized property rights in land, while subsequent legislation has introduced an array of reforms in fields such as the family home,[17] trusts of land[18] and registration.[19] In recent times this includes the enactment of a fully new module of property in the form of the commonhold,[20] which the Law Commission now seeks to expand.[21] Similarly, in Germany, the strong accession principle of the BGB, providing for the unity of land and building in one single module of property, was brought to an end by legislation providing for the creation of new modules of property, first by fully regulating the superficies right[22] and then by providing for separate ownership in flats.[23] There are two explanations as to why these reforms have not altered the static aura of property law. In some cases, as with the English commonhold, this can be explained by their inability to take hold in legal practice. In other cases, as with the German flat ownership, this might be explained by the tendency of the legislator to replicate the structure of the existing property rights: flat ownership is deemed to be conceptually the same as generic ownership under the BGB.

(c) Limits of the findings

The validity of these findings is limited by the narrow scope of this research:[24] this dissertation has been primarily concerned with property rights in land in England and Germany. To what extent these findings are relevant for other forms of property,

[17] Matrimonial Homes Act 1967.
[18] TOLATA 1996.
[19] LRA 2002.
[20] Commonhold and Leasehold Reform Act 2002.
[21] Law Commission, 'Law. Com No 394. Reinvigorating commonhold: the alternative to leasehold ownership (2020).
[22] ErbbauVO, now ErbbauRG.
[23] WEG.
[24] See 2.2.

especially movable and intangible property, would require more research, including relevant inroads in insolvency, intellectual property and corporate law. Similarly, whether these conclusions are valid for other jurisdictions also requires further research. From both a comparative and conceptual perspective this offers vast new research opportunities. As mentioned in Chapter 2.2, due to their importance in comparative research and their different property arrangements, the US and France are the most obvious candidates for this. However, other jurisdictions might offer other interesting contrasts, including some that are said to follow a *numerus apertus* principle, like Spain and South Africa,[25] or jurisdictions that have Torrens registration systems, as in Australia.[26]

9.2. Implications

These findings have relevant implications for (a) property doctrine and theory, (b) legal change and (c) policy making and legal reform, that could be the object of future research.

(a) Doctrine and theory

From a methodological perspective, this dissertation has shown that comparative research can be useful for both conceptual and doctrinal approaches to property law. This is important as, only 20 years ago, research in this field was scarce and seen as incapable of producing relevant outcomes. Until now, the conceptual cross-fertilization in this field has been limited to doctrines that are very general in nature, as the

[25] Bram Akkermans, 'The Numerus Clausus of Property Rights' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar 2017) 102; Christian von Bar, 'The Numerus Clausus of Property Rights: A European Principle?' in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart 2014) 447. E.g., proposing the use of Spain, Hanoch Dagan, *A Liberal Theory of Property Law* (CUP 2021) 113.

[26] See e.g. Real Property Act (SA) 1858. On this, see Brendan Edgeworth, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32 Mosash U L Rev 387.

numerus clausus, but this dissertation evidences that there is also much to learn from aspects that are more specific to national doctrine and theory.

The best example is probably the distinction between trespassory and successor liability. In this thesis, the distinction has been used as an analytical device to approach the effects of the *numerus clausus* on the private delineation of property rights, but its conceptual power is not limited to this case. The distinction, which in England has been recently applied to explain the nature of rights that are in the border between the law of property and the law of obligations, especially equitable property rights,[27] can also be usefully applied in Germany, especially for obligations with far reaching effects on successors in title. This cannot only help to bridge the difference between both traditions, but offers relevant insights into the conceptual nature of these borderline cases. For example, the German understanding of leases in land and security ownership as anomalous obligations might enlighten English views on the nature of equitable property rights, while the English right against rights thesis might provide a new angle to German leases and security ownership.

From a substantive perspective, the main implication of the findings of this thesis is that the many views arguing for the derogation or relaxation of the *numerus clausus* principle, seeing it as an unjustified limitation on party autonomy,[28] should be assessed with caution. The English judges and German scholars of the 19th century introduced this principle for a good reason: the protection of third-party autonomy. As argued in Chapter 6, from both a utilitarian and a principle-based perspective, this reason is still valid today; and, as shown in Chapters 7 and 8, it has a key role in preserving the ability of private law to deal with legal change.

(b) Legal change

The primary finding of this dissertation is showing that property law systems subject to a *numerus clausus* principle are capable of accommodating social and economic

[27] See 3.3.
[28] See 1.1.

change without undergoing structural transformation and that the principle itself plays a key role in this, as the substantive way in which it standardizes property rights can protect private autonomy. A first implication of this is that property law does not adapt itself to new circumstances alone. The building blocks of Smith's 'architectural' theory do not combine themselves: *someone* has to put them together. These legal builders are normally lawyers. As these practical uses of the building blocks expand among builders, they can become a non-explicitly formulated 'legal formant' of such legal systems.[29] However, as these practices do not necessarily make it to court, the role the creativity of lawyers plays in putting the generative power of property law in motion remains underexplored.

Even if some of the utilitarian theories discussed in Chapter 6.2 explicitly acknowledge that legal advice is essential in allowing parties to combine the building blocks of property law, their vision is too fragmentary as they only see it as a cost of their optimal standardization matrix.[30] Even if correct, such account of the role of lawyers is too narrow. First, it does not tell us anything about how lawyers fulfill this role in practice, how this solution might impact the property system from a dynamic perspective nor the importance that the prevailing legal culture might have in this process. The last point is very interesting from a comparative perspective, as lawyers from different legal systems also have different views regarding their role and that of the law. For example, German lawyers have traditionally been seen as especially loyal to the values embedded in their legal system, while English lawyers are often described as much more independent and committed to the interest of their clients.[31] This suggests that cultural elements can play an important role in explaining, for example, why flat ownership took off so rapidly in Germany, while the commonhold remains scarcely used in England. Exploring this aspect requires going beyond property theory and doctrine, into socio-legal studies.

[29] See Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 Am J Comp L 343, 384, 385. For examples, see 1.4 at n 62.
[30] Merrill and Smith (n 2) 35, 39–41.
[31] Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd edn, OUP 1992) 180, 181, 191–194.

A second finding of this thesis is that, occasionally, property law needs to be re-modularized and that this can only happen from outside. Chapter 5 has argued that, for good reasons, under the *numerus clausus* principle, this task is primarily allocated to the legislator, but, according to Chapters 4 and 6, when legislators fail to fulfill this role, judges have (occasionally) breached the principle. Thus, accounting for legal change in property law requires a theory that explains why, when and how the State decides to re-modularize the property system and what happens when it fails to do so. Because this question is outside its scope, this dissertation has only touched on this subject indirectly. However, the examples that have been discussed give some interesting hints as to where to start this inquiry: much of the contemporary re-modularizations of property rights made from 'inside private law' involves housing problems, while re-modularization driven from 'outside' often involves environmental problems, broadly defined.

(c) Policy making and legal reform

Finally, the findings of this thesis have relevant implications for policy making and legal reform: if the *numerus clausus* aims to contain the creation of successor and trespassory liability and this is a valuable function, attempts of reform providing for new property rights should be approached with care. At the present, this is especially true for common law jurisdictions, where some scholars are actively calling to expand the list of property rights as a means to enhance party autonomy.[32] Over the last decades, a number of these jurisdictions have introduced[33] or considered introducing[34] new property rights running with the land that expand the scope and intensity of the duties private dealings can impose on third parties. The outcomes have not always been met with positive comments and are said to be a cautionary tale against introducing new property rights without considering their impact on the rest of

[32] E.g., Dagan (n 25) 7, 104–105.
[33] E.g., the 'Covenant in Gross', introduced in New Zealand by the Amendments to the Property Law Act 2007 contained within the Land Transfer Act 2007.
[34] For England, see Law Commission, 'Law. Com No 186. Easements, Covenants and Profits à Prendre' (2008); Law Commission, 'Law Com No 327. Making Land Work: Easements, Covenants and Profits à Prendre' (2011).

the property system.[35] Thus, since reversing changes in property law is extremely difficult,[36] reforms introducing new property rights should probably be subject to a high threshold.[37] This suggests that the frequently criticised 'technocratic conservatism' of property law[38] should be seen in a more charitable light.

None of this is an argument against reforming property law through legislation. This dissertation has shown that, when legislators fail to act, this puts pressure on judges, who are not well placed to re-modularize the property system. This thesis has not intended to provide a plan for legislative reform of property law, but it still offers an insight into some elements that can make reforms in this field successful. One of them is that legislation that reproduces the modular structure of the relevant property system tends to work better. Probably the best example of this is the contrast between the success of the German flat ownership[39] and the relative irrelevance of the English commonhold.[40]

9.3. Final words

Benjamin Cardozo's passage quoted at the beginning of this thesis stated that the law must have a '*principle of growth*'.[41] This dissertation has argued that, in property law, such a principle is seen in a loose understanding of private autonomy based on a (not always consistent) collection of ideas coming from 19th century liberalism. Until now, thanks to the principle of *numerus clausus*, this loose conception of private autonomy

[35] Ben France-Hudson, 'The Recognition of Covenants in Gross in New Zealand: A Dangerous Advancement?' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law*, vol 10 (Hart 2019) 205.
[36] See 1.2.
[37] See Ben McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' in Susan Bright (ed), *Modern Studies in Property Law*, vol 6 (Hart 2011) 326–327; Pamela O'Connor, 'Careful What You Wish for: Positive Freehold Covenants' (2011) 3 Conv 191.
[38] Sjef van Erp, 'Comparative Property Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1037.
[39] See 8.3.
[40] See Lu Xu, 'Commonhold Developments in Practice' in Warren Barr (ed), *Modern Studies in Property Law*, vol 8 (Hart 2015) 332, 334–335.
[41] Benjamin N Cardozo, *The Growth of the Law* (Yale UP 1924) 20.

has allowed property law to be '*ready for the morrow'*.[42] Having an awareness of this is important. Over the 20th century this idea was almost lost in Anglo-American theory, under the heavy push of economic analysis of law; while in civilian systems, where the principle has never lost visibility, it has recently come under attack by scholars arguing for its relaxation and expanding the list of property rights. This does not imply that property law should not be reformed in light of new policy needs. The principle does not call for keeping property law static, but for re-modularization to occur via well-thought legislative interventions, that are consistent with the internal structure of property law and ensure that any diminishing of its modularity will be outweighed by policy gains that will stand the test of time.

[42] ibid.

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