
The Numerus Clausus of Property Law – An Economic Analysis

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Abstract

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The paper examines the numerus clausus of property law from a Law and Economics perspective.

Rights in rem (*ius in rem*) are rights of a person to a thing.(1) They are characterized by the fact that they act against the whole world (*erga omnes* effect) and not merely between two persons (*ius in personam*). Rights in rem are therefore also called absolute rights. They exist both in continental European civil law as well as in Anglo-Saxon common law(2), although their exact definition differs from jurisdiction to jurisdiction.

Property is such a right in rem.(3) However, not all rights in rem give rise to full ownership.(4) Rights in rem are only those that are defined by the legislator.(5) There is no contractual freedom with regard to rights in rem.(6) Parties cannot autonomously create new rights in rem(7) and contractual obligations must be fulfilled by means of a fixed repertoire of existing types of property rights defined by the law, which is why this principle is called the *numerus clausus* of property law.

The justification of legal theory for the numerus clausus of property law is the protection of legal transactions and the trust in the content of rights in rem.(8) Whoever acquires a right in rem should be entitled to the rights a certain right in rem embodies.(9) However, the principle does not prohibit that the property rights specified by law cannot be combined in a way that addresses the parties' specific needs. Nevertheless, they must do so in accordance with the positively determined specifications.(10)

The numerus clausus principle of property law is firmly anchored in German property law and, as such, an integral part of German private law. It is a prerequisite for the strict separation of the law of obligations and the law of property, the distinction between personal rights and rights in rem, and thus the autonomy of property law.(11) It is therefore not surprising that the numerus clausus is relatively uncontroversial among both, lawyers and scholars and usually not challenged,(12) even though the principle is not even explicitly mentioned in the German Civil Code. Some, however, see the numerus clausus as a restriction of freedom of contract, and hence requires a sound justification. Some argue that it should be within

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the freedom of the owner to create non-standardized rights in rem and trade those. Should individually created rights in rem not meet the needs of the market, the creator would have to bear the costs and endure the lower value of his title.⁽¹³⁾ Law and Economics scholars, however, have argued that individually created rights in rem do not only have an effect inter partes and that efficiency considerations also support the numerus clausus principle.

From an economic point of view, three main arguments are put forward in favor of the numerus clausus principle:⁽¹⁴⁾ that it can save third-party information costs through standardization (1), that it counteracts fragmentation of property rights and thus prevents from socially inefficient underutilization of resources (2), and that it reduces the costs of proof of ownership (3).

A significant economic analysis of the numerus clausus of property law has been presented by Smith and Merrill in 2000. They argue that it helps to limit the negative externality on other market participants associated with an inefficiently high number of autonomously created rights in rem. Outside parties would be burdened with high information costs if the number and nature of rights in rem were left to the discretion of the contracting parties. If individually created rights in rem existed, a potential legal possessor would first have to inquire about the scope of such property rights. ⁽¹⁵⁾ These information costs would be lower if rights in rem were merely chosen from a predefined catalogue.

The second economic justification of the numerus clausus is based on the idea that the principle prevents fragmentation of rights and thus inhibits an economically inefficient underutilization of resources. This argument, popularized by Michael Heller and better known as the tragedy of the Anticommons⁽¹⁶⁾, represents the flip side of the classic tragedy of the commons: If too many people have a say in how to use a resource, each party could potentially exclude others from use.⁽¹⁷⁾ This creates free-rider incentives and hold-out problems.⁽¹⁸⁾ Heller applies the concept of Anticommons to the numerus clausus of property law:⁽¹⁹⁾ If individual rights of the "bundle of property rights"⁽²⁰⁾ were distributed among different persons, which could be the case if rights in rem were individually formable, the bundle of rights could consequently fall apart in the long run and result in situations where objects could not be used and left idle. However, there are many situations in private law that involve a multitude of stakeholders⁽²¹⁾ and it is possible to mitigate Anticommons problems ex-post, for example by means of claims for settlement. ⁽²²⁾

Other approaches to justify the numerus clausus of property law are based on cost considerations. The argument goes that the principle leads to a reduction of system costs through uniform rights in rem. For example, a land register functions best if the number of registerable rights is limited and their content is defined by law.⁽²³⁾

The following article seeks to shed light onto these arguments while also taking perspectives from other legislations into account.

(1) Wieling, *Sachenrecht*, 2nd ed., Berlin/Heidelberg 2006, Vol. 1, Sachen, Besitz und Rechte an beweglichen Sachen, p. 4.

(2) Henry E. Smith/Thomas W. Merrill (2000): Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 *Yale Law Journal* 1 (2000), pp. 9 et seq.

(3) See Vieweg/Werner, *Sachenrecht*, 8th ed., München 2018, § 16 Sec. 1.

(4) A lien, for example, is effective against everyone and is therefore a right in rem. However, it only authorizes the holder to seek satisfaction from the object, Section 1204 of the German Civil Code.

(5) Schwab/Prütting, *Sachenrecht*, 28th ed., München 1999, § 3 Sec. 17.

- (6) Schwab/Prütting, Fn. 4 § 3 Sec. 17.
- (7) Fleischer: Der Numerus Clausus der Sachenrechte im Spiegel der Rechtsökonomie, in: Internationalisierung des Rechts und seine ökonomische Analyse, p. 127.
- (8) Wolf/Wellenhofer, § 3 Sec. 2.
- (9) Wolf/Wellenhofer, § 3 Sec. 2.
- (10) See. von Erp/Akkermans, Fn. 7, pp. 44 et seq., which address real easements and the so-called "stacking" of property rights.
- (11) See Wiegand, Numerus clausus der dinglichen Rechte. Zur Entstehung und Bedeutung eines zentralen zivilrechtlichen Dogmas, in: Wege Europäischer Rechtsgeschichte, Karl Kroeschell zum 60. Geburtstag dargelegt von Freunden, Schülern und Kollegen, Hrsg. Gerhard Köbler, 1987, p. 623 (638 et seq.).
- (12) See Schwab/Prütting, § 3 Sec. 17. Likewise Fleischer, Fn. 6, p. 127.
- (13) See Heller, The Boundaries of Private Property, Yale L. J., Vol. 108, No. 5, 1999, p. 1176.
- (14) See the overview in Fleischer, Fn. 6, p. 131 et seq.
- (15) *Smith/Merrill* (2000), Fn. 2, p. 69.
- (16) See *Heller*, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 Harv. L. Rev. 621-688 (1998).
- (17) See *Parisi*, The Language of Law and Economics (2013), p. 11.
- (18) See *Heller*, Fn. 19, S. 1177 with reference to *Rudden*, Economic Theory of Property Law: The Numerus Clausus Problem, in Oxford Essays on Jurisprudence 239, 242 (John Eekelaar/John Bell (Ed.), 3rd ed. 1987).
- (19) See *Heller*, The Boundaries of Private Property, 108 Yale L. Rev., 1163-1223 (1999), S. 1176 et seq.
- (20) In Anglo-Saxon literature, property is essentially understood as a "bundle of rights". According to this, property is composed of various rights, such as the right of possession, the right to draw fruit, alienation, destruction, etc.
- (21) See *Fleischer*, Der Numerus Clausus der Sachenrechte im Spiegel der Rechtsökonomie, in: Internationalisierung des Rechts und seine ökonomische Analyse, Festschrift für Hans-Bernd Schäfer zum 65. Geburtstag, 125-138, p. 134.
- (22) *Fleischer*, Fn. 21, p. 134 et seq.
- (23) *Fleischer*, Fn. 21, p. 135 et seq. with reference to *Wolff/Raiser*, Sachenrecht, 10th ed. (1957), p. 9 et seq.

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