A NUMERUS QUASI-CLAUSSID OF PROPERTY RIGHTS AS A CONSTITUTIVE ELEMENT OF A FUTURE EUROPEAN PROPERTY LAW?\(^1\)

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Abstract

In this article, the so-called *numerus clausus* doctrine of absolute rights is analysed. According to the *numerus clausus* doctrine, the number and content of real rights (rights against the world, distinguished from merely personal rights) is limited. As such, the *numerus clausus* doctrine is a characteristic of civil law systems, although it is not unknown in literature on the common law. The question is discussed whether harmonisation of property law in Europe is possible without finding a middle ground between the civil law, which considers the *numerus clausus* doctrine to be a fundamental part of its property law, and common law, where this doctrine as such is not applied. A middle ground could be found if, on the one hand, civil law systems would be willing to become more flexible by accepting a *numerus quasi-clausus* doctrine and, on the other hand, common law systems would be more willing to limit the creation of rights against the world by means of a standardisation of these rights.

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I Introductory remarks

In his Hamlyn lecture ‘Pragmatism and Theory in English Law’,\(^2\) Patrick Atiyah observes four basic distinctions or contrasts between civil law and common law: the logic and

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experience distinction, the rights and remedies contrast, the principle and precedent contrast and, finally, the academic and practical contrast. As such, these four contrasts do not describe the differences between civil law and common law inaccurately, but only if it is taken into consideration that the level of discussion is rather abstract and not based upon historical-comparative analysis. The four contrasts are the result of the historical development of the law and the prevailing legal culture. They should not be seen as a static description of the differences but only as still existing, yet changing, characteristics. Is it still true today that English (or Scottish, Irish, American) lawyers are less inclined to reason logically, only think in terms of remedies and precedent and ignore academic writings? Are civil lawyers (from France, Germany, the Scandinavian countries, Central and Eastern Europe, Turkey and Japan) not interested in experience, but only in rights, principles and academic legal literature? The answer can only be negative. Atiyah certainly recognises this.³ An English lawyer knows very well how to build a solid argument based upon logical reasoning and a civil lawyer is very much aware of the fact that although his client may invoke an abstract right, this certainly does not always mean victory in a concrete case. Furthermore, in the area of property law it becomes abundantly clear that English lawyers have developed an ability to construct abstract and complex legal systems of thought out of an enormous amount of cases and special statutes; as abstract and complex, I might add, as can be found in nineteenth-century German Pandectist legal thinking.

It is often said that comparative law and legal history are two sides of the same coin: comparison. Comparative law is interested in comparison on a horizontal level, legal history on a vertical (diachronic) level. Especially in the area of property law, a historical-comparative analysis very often proves to be revealing.⁴ Not only does this approach explain the existing law from two perspectives, it can also give indications as to the direction in which the law is developing.

In this paper, based on the historical-comparative method, I would like to focus on a central concept of civil property law: the numerus clausus of absolute rights. According to the numerus clausus doctrine, the number of absolute rights and their content is closed. Is this rigid doctrine really necessary? Could (and should) it be less rigorous and more open to innovation? A more open approach, towards a numerus quasi-clausus, might be the way towards a well-reasoned and gradual acceptance of common law institutions and concepts, such as the trust, in the civil law. The civil law will be compared with the common law approach and it will be attempted to find common ground between (civil law) theory and (common law) pragmatism.

II The feudal system, the French Revolution and numerus clausus

For a better understanding of the importance of numerus clausus in civil law systems, some historical remarks are necessary. These will concern the role of the feudal system with respect to property relations and the abolition of the feudal system on the continent of Europe as a


result of the French Revolution. Consequently, the principles and rules of property law had to be reformulated on the continent. In England, however, the feudal system was not abolished and remained the - legal-technical - basis of property law. The same applies to countries which derive their property law system from English law, such as Ireland.5

The feudal system came to England from Normandy as a result of the Norman Conquest after the Battle of Hastings in 1066. It was, both on the continent of Europe and in England, not only a legal system; it was first of all a political and social framework.6 The feudal system created a bond between the king and a tenant-in-chief, between the latter and a mesne lord or between a mesne lord and a vassal. Rights to land were granted in return for services. Gradually, the feudal system developed into a system of land law.7 In English law, the historical roots of property law can be seen in the continued use of the concepts ‘tenure’ and ‘estate’. Land is ‘held’ (not ‘owned’ in the civil law sense) and the tenant is entitled to an ‘estate’. Various types of estates can be distinguished, but an essential characteristic of each estate is time. The two major types are the freehold (unlimited duration) and the leasehold (limited duration). Under English law this system of landholding became even more complex and intricate because of the development of a duplex ordo: common law and equity. It made thinking about property rights even less absolute than it already was and it also created an atmosphere in which legal thinking could be infused with economic notions.8 If A holds a common law estate in land (e.g. A is a freeholder), but his spouse B spends money from which both A and B profit, B can be given equitable rights in the land: A then becomes trustee for himself and B as beneficiaries of a trust.

As I already mentioned above, on the continent of Europe the feudal system was abolished as a result of the French Revolution. Also, fundamental human rights were formulated and it was the person of the citoyen (citizen) who became the focus of political

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6 Cf. R.C. van Caenegem, An Historical Introduction to Private Law (Cambridge: Cambridge University Press, 1992), p. 20. See also the definition in Black’s Law Dictionary (St. Paul, Minn.: West Publishing Co., 1990) sub voce ‘feudal system’: ‘... A political and social system which prevailed throughout Europe during the eleventh, twelfth and thirteenth centuries, and is supposed to have grown out of the peculiar usages and policy of the Teutonic nations who overran the continent after the fall of the Western Roman Empire, as developed by the exigencies of their military domination, and possibly furthered by notions taken from the Roman jurisprudence. ...’. Cf. the definition in David M. Walker, The Oxford Companion to Law (Oxford: Clarendon Press, 1980) sub voce ‘Feudalism’: ‘... Feudalism thus came to be recognized over much of western Europe as a system of administration, jurisdiction, military service, and land tenure. ...’. See also J.H.M. van Erp, ‘Via open normen naar Europees goederenrecht’, in S.E. Bartels and J.M. Milo (eds.), Open normen in het goederenrecht (The Hague: Boom Juridische Uitgevers, 2000), pp. 61 ff., especially pp. 67 ff.
8 It is, therefore, no coincidence that the economic analysis of the law was developed and first applied by American and English lawyers. It will also come as no surprise that law and economics scholars frequently conclude that the common law (almost by nature) inclines towards reaching efficient results. But this conclusion is also, at least partially, caused by the self-perception of the common lawyer. You recognise what you were trained to observe and were taught to regard as an important value.

The feudal concepts of ‘tenure’ and ‘estate’ underwent a process of transformation and as a result have become formats at common law and in equity that enable maximum economic use of land and buildings. Legal thinking and economic analysis show close links in this area of the law. See F.H. Lawson and B. Rudden, The Law of Property (Oxford: Oxford University Press, 2002), pp. 169 ff.
See, from a historian’s viewpoint, S. Schama, *Citizens: A Chronicle of the French Revolution* (London: Penguin Books, 1989), pp. 428 ff. The ideology underlying legal thinking during and after the French Revolution is of considerable influence today. Not surprisingly, the new Dutch Civil Code begins with rules regarding the subjects of private law (natural and legal persons) in Books One and Two, followed by rules that govern the interactions between these subjects and the various rights these persons can have in regard to (physical and non-physical) objects. Of course, exceptions exist. Matrimonial property law can be found in Book One.

In the area of private law, this is somewhat different. Of course, property law too applies to all citizens and to all objects, and is thus the expression of the ideal of equality. But the ideal of freedom could not be applied here to the same degree as in contract law. The old order of the feudal system had to be and remain abolished. Property law is, generally speaking, of a mandatory nature, limiting the freedom of parties to create rights against the world.

This process of change after 1789 - the year in which the French National Assembly abolished the feudal system, but did not replace it with new rules - led to a completely different system of property law. It was (and still is) unitary in nature: the basic principles of property law apply to all objects (real and personal property). As already remarked above, property rules are mandatory law, unless certain, albeit limited, freedom is given to the parties. Ownership - the most complete absolute right, in respect to both content and duration, that a subject can have in regard to an object - can only exist in the form a non-fragmented unitary right. All other absolute rights are ‘limited’ real rights. Third parties must be informed about absolute rights, as they are bound by those rights without their consent. As to movables, the publicity which is necessary to justify that third parties have to accept the existence of absolute rights is closely linked with possession. Regarding immovables, third parties are informed through registration systems. Finally, the number, content, creation, transfer and extinction of absolute rights is regulated by the law. This is what civil lawyers call the *numerus clausus* of absolute rights. This *numerus clausus* cannot be isolated from the other basic aspects of civil property law that I mentioned.

In the area of property law, the ideals of the French Revolution have resulted in a simple, universal scheme, which is aimed at reaching legal certainty, predictability and transparency. In the following pages, I will elaborate on the role and function of the *numerus clausus* doctrine in civil law systems and defend the idea that standardisation of ‘rights

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9 See, from a historian’s viewpoint, S. Schama, *Citizens: A Chronicle of the French Revolution* (London: Penguin Books, 1989), pp. 428 ff. The ideology underlying legal thinking during and after the French Revolution still is of considerable influence today. Not surprisingly, the new Dutch Civil Code begins with rules regarding the subjects of private law (natural and legal persons) in Books One and Two, followed by rules that govern the interactions between these subjects and the various rights these persons can have in regard to (physical and non-physical) objects. Of course, exceptions exist. Matrimonial property law can be found in Book One.

10 Cf. Article 17 of the Déclaration des Droits de l’Homme et du Citoyen (Declaration of the French National Assembly of 26 August 1789): ‘La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n’est lorsque la nécessité publique, légalement constatée, l’exige évidemment, et sous la condition d’une juste et préalable indemnité.’ (Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.)
The expression ‘rights against the world’ is certainly useful and desirable, but should not be as strict as it is in some civil law countries. I will defend that, without endangering the enormous advantages that the French Revolution brought to property law, some openness will prove beneficial: instead of a numerus clausus a numerus quasi-clausus should be adopted.

III The role of the numerus clausus doctrine

Before I discuss the role of the numerus clausus doctrine in more detail, it may be useful to reflect briefly upon the distinction between the object of a property right and the legal relation constituting the rights/duties between subjects in regard to such an object. These two aspects of property entitlements should be distinguished clearly. In what follows, I will focus on the right of ownership, not on other absolute rights. It should be borne in mind, however, that what applies to the right of ownership mutatis mutandis also applies to limited real rights.

The object of a right of ownership (very often simply called ‘ownership’) can be a corporeal thing (movable or immovable) as well as a right. To give an example of the latter: a contractual right, although personal in nature and which only binds the parties to a contract, is, nevertheless, part of a person’s patrimony and can, as such, be the object of a right of ownership. The effect is that it can be transferred to someone else. Whether you limit the ‘right of ownership’ to rights regarding corporeal things (as is done in the new Dutch Civil Code) or not is a matter of legal terminology, closely related to the legal terminology and the structure of the legal system in which this particular term is used. A good example of a very broad definition of the term can be found in Article 1 of Protocol 1 of the European Convention on Human Rights:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The expression ‘rights against the world’ can be compared with absolute rights in the civil law sense. It should be borne in mind, however, that rights against the world (absolute rights) sometimes only apply to most, but not all, or even only a limited category of third parties. An example of such a limitation is the protection of a bona fide third party acquirer against the original owner who, e.g., avoided a sales contract with his purchaser, in a situation where the purchaser in his turn had sold and transferred the object. Under Dutch law, the causal system of transfer applies, but still - of course under certain conditions - the bona fide third party will not lose his right of ownership. Cf. Articles 3:86 (movables) and 3:88 (registered property, such as land) new Dutch Civil Code.

A notorious problem is whether goodwill can be an object of property law. This question was only recently decided by the Hoge Raad (Netherlands Supreme Court) in its decision of 31 May 2002, Rechtspraak van de Week 2002, 89, also to be found on the web site of the Dutch Judiciary: <http://www.rechtspraak.nl>. Incorporated goodwill (the surplus value of all the property in an enterprise) can be ‘property’ as such - and thus an object of property law - in the sense of Article 3:1 Dutch Civil Code. Non-incorporated goodwill is not property. (Article 3:1 reads as follows: ‘Property is comprised of all things and of all patrimonial rights.’)

Legal theorists have examined at great length what the object of ownership (and, consequently, the object of rights derived from ownership, such as security interests) can be.\(^{14}\) This has led, e.g., Charles Reich to express the view that ‘new property’ should be recognised as a legal category. In his own words: ‘New property represents a relationship between an organization and the holder, the organization being the “the source” of the interest, the holder being the beneficial owner.’\(^{15}\) Examples of this ‘new property’, which he also describes as ‘the development of economically valuable interests that are of vital importance to the holders of those interests’, are job security and the right to be in a national park or forest.\(^{16}\)

What can be the object of a right of ownership or other absolute right is a different problem area compared to the question whether only those rights can be recognised as absolute (i.e. as rights against the world) which are mentioned in a mandatory catalogue or whether freedom exists to create ‘new’ absolute rights. This latter question does not deal with the object of, e.g., ownership or security interests, but with the type and content of the right which is claimed to be absolute in regard to a particular object. Of course, the two questions interrelate. If - to give an example - it would be accepted that a right for every citizen exists to walk in a national park, the question arises what the nature of this right is. Is it a public law or a private law right? Assuming that it could be a private law right, would it be a personal or an absolute right? If it is accepted as an absolute right according to private law, what does this mean in the light of the existing *numerus clausus*? Here we touch the intensely complicated borderline both between public law and private law and between the law of obligations and the law of property.\(^{17}\) Let me give another example, to show how difficult it already is to draw a clear line only between contract and property. Sometimes contractual rights can become ‘commodities’ and are treated as objects of property law. An illustration are swaps: contracts aimed at taking over - but only between the two parties among themselves - the other party’s position in regard to a loan agreement which that party concluded with, e.g., a bank. As a result of the swap, interest rates, currencies or both can be ‘exchanged’: the two parties who conclude a swap will each behave as if he were the other party. If party A pays a fixed interest rate and party B a floating rate, after the swap A will pay B the floating rate and B will pay A the fixed rate.\(^{18}\) A swap is, as such, a derivative, like futures and options. It derives its own value from the underlying value, in this case the existing loan contracts with the agreed

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\(^{16}\) Reich, ‘New Property after 25 Years’, p. 226.


\(^{18}\) This implies, of course, an element of speculation. In the future, A hopes to be better off by paying the floating rate (when the floating rate gets lower than the fixed rate) and B hopes the same by paying the fixed rate (when the floating rate gets higher). Only one of them can be right.
interest rates and currencies. It is generally assumed that swaps and derivatives are to be considered as ‘contracts’. However, once these contracts have been standardised and in this form are traded in an exchange, they may also be considered to be commodities and, hence, goods. If this qualification is correct, it would mean that relationships which start as being contractual in nature may go through a metamorphosis and end up being, at least in part, proprietary in nature. The very moment, however, the swap has to be executed (e.g. through netting), it would, in this respect, still be a contract. The result of the metamorphosis would then be a legal relationship of a hybrid nature. I will not go any further into this; I would only like to point out that if this really would be the case, for reasons of clarity and certainty a formal line should be drawn between the contractual side and the commodities side of a derivative. A suggestion for the drawing of this formal line may be that a derivative becomes (at least in part) a commodity once it has been standardised and for that reason can be traded almost anonymously at an exchange. An advantage of this formal approach is that the proprietary side of the derivative will be clearly separated from its contractual side. The proprietary side could, to offer an illustration, only be reflected in the formalities required for the transfer of the derivative - the acceptance of screen trading as a new form of (instantaneous) transfer next to, e.g., assignment and the handing over of a bearer document - without influencing matters like netting. It will be obvious that such questions, as I can only outline here, are of a perplexingly complicated nature. In the following pages I will only focus on the numerus clausus as such and not on the object of absolute rights, including the borderline between contract and property.

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21 Cf. K. Medjaoui, *Les marchés à terme dérivés et organisés d’instruments financiers. Étude juridique* (Paris: L.G.D.J, 1996), pp. 261 ff., where a discussion can be found about the (my translation) ‘definition of and distinction between a futures “contract” and a negotiable option: the products’. On p. 268, Medjaoui makes the following remarks, which show how troublesome the qualification ‘contract’ or ‘commodity’ proves to be:

Ainsi, pour une même valeur, plusieurs options et contrats, d’identification équivalente dans leur qualité, quantité, échéances, vont être créés et admis à la négociation.
Il s’agit de produits fongibles, dans leurs caractéristiques qualitatives et quantitatives intrinsèques; soit une caractéristique commune aux valeurs mobilières, mais le rapprochement s’arrête là.

He adds (p. 283):

Ces produits à terme ne sont pas des valeurs mobilières, bien que certains emploient, à tort, l’expression d’émission’, pour qualifier leur création. Cette vision est fausse et risque d’entretien des confusions, non seulement par rapport à la procédure de création de ces produits d’une part, mais aussi quant à leur contenu juridique, confronté à celui d’une valeur mobilière, principalement une action, d’autre part.

22 See, for a comparable problem area (immobilisation of securities), R. Goode, ‘The Nature and Transfer of Rights in Dematerialised and Immobilised Securities’, *Butterworths Journal of International Banking and Financial Law* (1996), 167 ff. Particularly interesting is the analysis of possible characterisations of entitlements which a depositor of securities might have towards the institution which holds the securities, e.g. a bank (Goode, loc. cit., pp. 170 ff.).
For civil lawyers, the *numerus clausus* doctrine is a basic element of property law.\(^{23}\) For a better understanding of what follows, it may be useful to reiterate what the *numerus clausus* doctrine is, in the light of other basic elements of civil property law, before we contrast civil law with common law. According to the *numerus clausus* doctrine the number of absolute rights is limited, their content is restricted and it is laid down in mandatory rules how absolute rights can be created, transferred and extinguished.\(^{24}\) The Dutch Civil Code recognises the following absolute rights: ownership, servitudes, emphyteusis, superficies, right of apartment (condominium), pledge and mortgage.\(^{25}\) Generally speaking, these rights can also be found in other civil law systems. In the civil law, ownership is the most absolute right and it cannot be fragmented: only one person can be the owner, no distinction between legal and economic ownership is accepted. In order to justify the binding nature of absolute rights against third parties, these parties must be informed about those rights. With regard to movables, information is provided by possession. She who possesses an object is at an advantage when she claims to be the owner, as her right of ownership will be presumed. Information can also be given through registration. An important example is the land registry.

The *numerus clausus* doctrine is characteristic of the post-feudal civil law systems. However, the feudal system still is the basis for property law in England and countries with property law systems which are historically based on English law such as the United States.\(^{26}\) It will, for that reason, come as no surprise that the *numerus clausus* doctrine, even the concept of *numerus clausus* as such, was hardly ever discussed in English and American legal literature. This seems to be changing. In 1993 Gordley pointed out that, at least from an American perspective, the conceptual differences between civil and common property law are no longer fundamental.\(^{27}\) In a very interesting, recent, exchange of views, Hansmann and Kraakman\(^{28}\) have debated with Merrill and Smith\(^{29}\) whether the *numerus clausus* doctrine also

\(^{23}\) The following can only be a very general and superficial overview of some basic aspects of civil property law. Of course, differences exist between the various civil law systems. I need only refer to the acceptance of so-called ‘Anwartschaftsrechte’ under German law, which are seen as quasi-real rights. ('Anwartschaftsrechte' are, literally translated, expectation rights, such as the right of the buyer under a retention of title clause; a buyer expects to become owner after payment of the purchase price.)

\(^{24}\) See, for Dutch law, Asser-Mijnssen-De Haan, *Goedereenrecht. Algemeen Goedereenrecht* (Deventer: W.E.J. Tjeenk Willink, 2001), nos. 31, 39 and 241 f. Of course, borderline cases exist. Lease, e.g., although a contract, has certain features which make it a quasi-absolute right for civil lawyers. The lessee is protected in her lease rights and bound by her duties arising from the lease against a transferee of the lessor.

\(^{25}\) Absolute rights are also recognised outside the Civil Code. An example are intellectual property rights.

\(^{26}\) It is remarkable that Th.W. Merrill and H.E. Smith in their article ‘Optimal Standardization in the Law of Property: The Numerus Clausus Principle’, 110 *Yale Law Journal* (2000), 1 ff., at p. 6, include American property law among the ‘post-feudal’ legal systems. If they mean that the feudal system as a system of government does not apply in the United States, they - obviously - are correct. English feudal concepts are, however, still the roots of American property law.


exists, albeit perhaps implicitly, in American property law. They all seem to agree that in American common law standardisation has taken place, which in its final result comes close to the civil law *numerus clausus*. Merrill and Smith distinguish the following categories of common law property rights. In regard to estates in land, they distinguish the following five possessory interests: fee simple absolute, defeasible fee simple, fee tail, life estate and lease. Also with respect to land, they distinguish the following five concurrent interests: tenancy in common, joint tenancy, marital property, trusts and condominiums, cooperatives and time-shares. Concerning land, finally, the next four basic forms of non-possessory interests are distinguished: easements, real covenants, equitable servitudes and profits. With respect to personal property the available forms of property rights are more limited, given the nature of movables and accounts receivable.

Merrill and Smith argue that the *numerus clausus* is the expression of an ‘optimal standardization’ of property rights. The economic benefits of a new property right must outweigh the costs for third parties to become informed about this new right. In their view, the customising of property rights should, for several reasons, be done by the legislature and not by courts. The legislature may give rules which can be clear, universally applicable, comprehensive, stable, prospective and it may take into account whether and, if so, how implicit compensation should be given to those affected by changes in property rules.

Hansmann and Kraakman disagree with the analysis offered by Merrill and Smith. They argue that property rights are characterised not, as Merrill and Smith argue, by being good against the whole world, but by being enforceable against subsequent transferees of other rights in an ‘asset’. Furthermore, they argue that the *numerus clausus* doctrine as it, in their view, exists in the common law is not about standardisation, but about ‘regulation of the types and degree of notice required to establish different types of property rights’. The purpose of regulation is not that third parties are given information, but to enable third parties to verify ownership of the rights offered for conveyance. In this verification process, property law assumes that ‘all property rights in a given asset are held by a single owner, subject to the exception that a partitioning of property rights across more than one owner is enforceable if there has been adequate notice of that partitioning to persons whom it might affect.’ The cost-benefit analysis, as defended by Hansmann and Kraakman, is aimed at weighing the utility of the partitioning and the costs of giving notice.

### IV Towards a *numerus quasi-clausus* or standardisation of property rights?

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30 Ibid., pp. 12 ff.

31 Ibid., pp. 38 ff.

32 Ibid., pp. 58 ff.

33 They conveniently summarise the position of Merrill and Smith and contrast it with their own approach in the first pages of their paper.


35 Ibid., pp. 1 ff.

36 Ibid., pp. 21 ff.
It seems to me that the approach taken by Merrill and Smith, more than the analysis offered by Hansmann and Kraakman, comes very close to how a civil property lawyer looks at the content, historical background and justification of the *numerus clausus* doctrine. Hansmann and Kraakman seem to suggest that they do not accept a strict distinction between rights in personam - which only exist between two or more specific parties - and rights which are good against the world. In their view, a right can also be absolute if it is not binding against the world, but merely between a person and a certain category of other persons. This latter approach is more of a common law than of a civil law nature. In the words of Lawson and Rudden:

... English lawyers have always been accustomed to classifying interests in land in terms of the time for which they could endure. Leases were easily fitted into this perception, although they grew up outside the feudal system. Furthermore, the co-existence of these estates was common.  

This is different in the area of personal property law, but even there property rights are not completely absolute in the civil law sense. This is caused, in part, by the distinction between common law and equity, but also by the ‘relativity of ownership’. What matters is priority of entitlement, not absolute entitlement.  

See, e.g., what Bridge writes in his *Personal Property Law* where he defines rights in property:

> We can start by saying that the question deals with the relationship between an individual and a thing, and the effect of that relationship on the world at large. Property rights come in various shapes and sizes. ... There exists also a range of equitable rights over personality. The touchstone of a property right is its universality: it can be asserted against the world at large and not, for example, only against another individual such as a contracting partner. This is not to say, however, that universal rights are invincible: common law property rights may in certain instances be overridden, and equitable rights, for example the interest of a trust beneficiary in the trust assets, are always vulnerable to the *bona fide* purchaser for value without notice of the legal estate.

But even though Merrill and Smith come nearer to the civil law understanding of the *numerus clausus* doctrine than Hansmann and Kraakman, nevertheless - in essence - their analysis too is that of a common lawyer looking at the civil law. The number of property rights they have found in American property law, also in the light of the *duplex ordo* of common law and equity, still is so open that what they have found should not be qualified as a ‘*numerus clausus*’, but as ‘standardisation’. Standardisation means that a limited number of categories is used for practical reasons, but it does not imply that this number is completely closed. Courts may still decide that certain rights, created by two parties and not to be found in the existing categories, bind certain or even all third parties. Standardisation also does not mean that the contents of the various categories is as fixed as it is in the civil law by mandatory rules.

I certainly do not want to argue that the analysis offered by Merrill and Smith and by Hansmann and Kraakman is meaningless for a civil lawyer. On the contrary, it makes clear

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39 Bridge, *Personal Property Law*, p. 12. See also Wylie and Kenny, *Irish Land Law*, pp. 177 ff. (‘Modern commercial practice has done much in recent decades to break down the concept of absolute ownership of chattels. Indeed, commercial law has adopted many of the concepts originally derived from land law in this respect, so that the leasing and mortgaging of valuable chattels like ships and aircraft is quite common.’)
what the functional and economic backgrounds of the *numerus clausus* doctrine are. It sheds light on the advantages and disadvantages, the economic benefits and costs, of the civil law *numerus clausus* doctrine. This doctrine, if strictly applied, creates the risk that innovation takes too much time, which might hamper the further development of new categories of property rights that are being developed in legal practice. Two obvious examples are the trust and time-share arrangements. I agree with Merrill and Smith that courts should be extremely careful when they decide to create new property rights.\textsuperscript{40} The Dutch experience under the old Civil Code is a good example. The *Hoge Raad* (Netherlands Supreme Court) in 1929 accepted that movables and claims could be transferred to a bank for security purposes.\textsuperscript{41} In fact, the Supreme Court decided that a non-possessory pledge could be created (or, in other words, a right of mortgage could also rest on movables and claims) in clear violation of the old Civil Code. Problems concerning this transfer for security purposes kept arising and each time had to be resolved by the courts. When the new Civil Code no longer allowed the transfer for security purposes and introduced the non-possessory pledge, the transitory law converted existing transfers for security purposes into this new type of pledge. Courts would never have been able (and competent) to make such a fundamental change in property law; it could therefore only be done by the legislature.\textsuperscript{42}

The legislature should be aware of the leading role it plays in the structuring of property law and the adaptation of property law to new needs. So far, the Dutch legislature - as well as other legislatures in civil law countries - does not seem to realise this. This may change if there is economic pressure to accept new absolute rights. In the Netherlands Antilles, e.g., with its large offshore business it is now being considered to introduce the trust even though the new Dutch Civil Code - albeit it in the area of property law with important exceptions - now also applies on these islands.\textsuperscript{43} If the need for change becomes really pressing, courts may have no alternative than to fill the vacuum which the legislature leaves, but this should be done with the utmost care. What Merrill and Smith as well as Hansmann and Kraakman have made abundantly clear to civil lawyers is that the *numerus clausus* doctrine also serves an economic purpose and that this purpose should always be borne in mind. For that reason, I would argue that the strict civil law *numerus clausus* doctrine should not be applied as strictly as it is done in, e.g., the Netherlands. It should develop towards a *numerus* quasi-\textit{clausus}: some flexibility is needed to regulate new forms of rights in property, such as the trust and time-share arrangements. If the legislature does not act, courts should, but with extreme care.


\textsuperscript{42} Cf. Article 3:84 (3) Civil Code (the so-called ‘fiducia ban’) and Article 86 Overgangswet Nieuw Burgerlijk Wetboek (Transitory Law New Civil Code).

\textsuperscript{43} This will be a civil law trust, where the trustee will be the sole owner of the trust property and the beneficiary does not have any property entitlements. Cf. for the law of Scotland E. Reid, ‘Scotland (Report 1)’, in V.V. Palmer (ed.), *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press, 2001), p. 234, and for the law of South Africa C.G. van der Merwe, J.E. du Plessis and M.J. de Waal, ‘The Republic of South Africa (Report 2)’, in Palmer, *Mixed Jurisdictions*, pp. 194 ff.
What civil law could learn here from common law is flexibility, which enables property law to be more responsive to economic developments in the law. What the common law could learn from civil law is that closing legal categories creates more legal security and reduces information costs. The question remains what our starting point should be: common law pragmatism or civil law theory? In my view, neither should be the starting point. Historical-comparative analysis, taking into account socio-economic factors, should lead the way towards the most workable approach.